(25,364)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 534.

YORK MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

V. B. COLLEY ET AL.

IN ERROR TO THE COURT OF CIVIL APPEALS OF THE FOURTH SUPREME JUDICIAL DISTRICT, STATE OF TEXAS.

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1-23 V. B. COLLEY, one of the defendants herein, being first duly sworn, testified as follows, to-wit:

Redirect examination.

By Mr. King:

My name is V. B. Colley. I live in Stockdale, Wilson County, Texas. I am one of the defendants in this case. This contract (referring to contract handed the witness) is signed by Mr. C. J. Bauderer for the York Manufacturing Company. I have known Mr. Bauderer since, I think it was a few days before the signing of this contract; I met him in San Antonio. This contract was signed in San Antonio, drawn and signed in San Antonio, and Mr. Bauderer signed it as a representative of the York people. I don't just remember how long after the signing of this contract it was before the commenced this ice plant; it was some little time though, I think about sixty days. I am not positive on that subject. The erection of the plant was superintended by Mr. Campbell, and he did the biggest part or nearly all of the delicate work on the plant,
24-45 and work that required expert labor was *required* by him. Mr. Campbell was representing the York Manufacturing Company. The contract with the York Manufacturing Company was, they had entire charge of the plant. After the erection of the plant and at the time we were testing out the plant he was superintending it and stayed there. We ran the plant about, several days, I don't just remember the number of days, but we ran it day and night for several days and he stayed there the biggest part of the time, and was very particular to leave all instructions at any time he left the plant, what should be done and not to be done, and after the test was made he refused to turn over the plant to us until we signed a clear receipt releasing him from all responsibility of the operation of the plant, and told us if we didn't sign it he would stay there and hold it until we did. There wasn't any keys to the plant, but we had possession of it and told us he would stay there until that receipt was signed, and after we signed those papers which he presented to us he gave us possession of the plant after it was erected. I stated awhile ago that he did the greater part of the work on the plant.

* * * * * * *

46 Cross-examination.

By Mr. Abbott:

I first became acquainted with Bauderer about the time of the signing of the contract; possibly a few days before. My recollection is that it was in San Antonio I met him. We went to see the San Antonio Machine and Supply Company and I met him there, and the subject of building an ice plant was taken up with him. We asked the San Antonio Machine and Supply Company if they were

handling ice machinery, and they said "No, but that Mr. Bauderer was". They phoned him to come down and take it up with us, and when we saw him he solicited the sale of the machinery to us, and through his procurement the contract was made. In my opinion the contract was not carried out just as it was made. The machinery was delivered after considerable delay, and some of it was put into the plant there at Stockdale. This does not comprise all of the machinery we have in the plant. At that time it was practically all the machinery in the plant, outside of the engine. We were constructing an absolutely new plant at that time, and all the machinery was new. The real fact is that Bauderer solicited the sale of this machinery to me and Mr. Billingsley. Most of the solicitation was in San Antonio; some of it in Stockdale. He came out there and talked to us about it. I think he came out there and looked at the proposed place to put it, and he recommended the machinery. I know he was soliciting of the contract; possible a few days before. My recollection is sued on. We signed it on the date that was on the contract; I don't remember just the date. The date of our signature was about the date the contract bears, the first date it bears, the twenty-fourth of April, and Mr. Bauderer signed it about the same time. I think there were about three contracts executed, and I think that is one of them. As far as I can tell there have been no alterations made in the contract after I signed it. Mr. Bauderer stated it was not
47 necessary for the York Manufacturing Company to approve the contract; that he thought that owing to the short time he had in getting the machinery down there it would go through without approval. I knew the contract provided for approval; that was called to my attention at that time in that way. We had some difficulty in getting them to deliver the goods after the contract was made; they didn't ship them.

Referring to the blue print which was offered in evidence, marked "Def. B", it shows the outline of the building and machinery and—the outline of the building and the location of the machinery and the freezing tank. It doesn't cover the actual freezing tank itself, only the dimensions and its location in the building. The building was supposed to be erected by the blue prints. I think the building was under construction; I think the foundation was in. This blue print is supposed to show the actual dimensions of the building; my recollection is that was the real purpose.

I cannot tell when Mr. Campbell reached Stockdale without referring to those papers, but my recollection is it was some time in July of that year. He was there before the machinery reached there. I think he remained in Stockdale about twenty days after the machinery reached Stockdale. I don't know how long it took to erect the machinery after it reached there, about twelve or fourteen days, I think, to put it in where we could make a test on it. We erected all that fall, some parts of it, and changed it after he left there.

We signed a receipt that the plant was received in good condition and in good running order, I believe, or something to that effect. He demanded that of us before he would deliver entire possession of the property. There were no conditions. At first I told him I didn't

like the way the plant was running, and I didn't sign the receipt then. I did not sign it the first time he asked me. I think
48 he asked us three or four days before we did sign it to sign it. We signed the receipt the day he told us he wouldn't deliver it to us until we signed the receipt.

I remember the fact of the plant being charged. It was several days after that that I signed the receipt.

That is Colley and Billingsley's signature to that paper, and I suppose Mr. Campbell's signature.

(The following is a copy of paper introduced:)

"Contract No. 2214-C With V. B. Colley & J. E. Billingsley. First shipment arrived Sat. July 13th. Including all Ice machinery.

"Unloading Car".

Purchaser (Sign here). Colley & Billingsley.

Erecting Engineer (Sign here). E. Campbell."

4

"Filed 12 day of May 1912. J. E. Wiseman, District Clerk, Wilson Co., Texas."

Colley & Billingsley's signature is attached to that paper.

(The following is a copy of paper introduced:)

"Contract No. 2214-C. With V. B. Colley & J. E. Billingsley.

Accepted Aug. 10th, 1912.

"Purchaser (Sign here). Colley & Billingsley.

Erecting Engineer (Sign here). E. Campbell."

"Filed 12 day of May 1914. J. E. Wiseman, District Clerk, Wilson Co., Texas."

Colley & Billingsley's signature is attached to that paper also.

(The following is a copy of paper introduced:)

49 "Contract No. 2214-C. With V. B. Colley and J. E. Billingsley.

Engineer arrived July 10th 9 A. M. 1912.

Purchaser (Sign here). Colley & Billingsley.

Erecting Engineer (Sign here). E. Campbell."

"Filed 12 day of May 1914. J. E. Wiseman, District Clerk, Wilson Co., Texas."

The signature of Colley and Billingsley is attached to that instrument.

(The following is a copy of paper introduced:)

"Contract No. 2214-C. With V. B. Colley & J. E Billingsley.

Began erecting Ju-y 15.

Purchaser (Sign Here). Colley & Billingsley per V. B. Colley.

Erecting Engineer (Sign Here). E. Campbell."

"Filed 12 day of May 1914. J. E Wiseman, District Clerk, Wilson Co., Texas."

Colley & Billingsley's signature is attached to that instrument also.

(The following is a copy of paper introduced.)

"Contract No. 2214-C. With V. B. Colley & J. E. Billingsley.

Ready to charge August 2.

Purchaser (Sign here). Colley & Billingsley per V. B. C.

Erecting Engineer (Sign Here) E. Campbell."

Filed 12 day of May 1914. J. E. Wiseman, District Clerk, Wilson Co., Texas."

50 Redirect examination.

By Mr. King:

We worked on the plant some under Mr. Campbell's direction.

J. E. BILLINGSLEY, one of the defendants herein, being first duly sworn testified as follows:

Direct examination.

By Mr. King:

My name is J. E. Billingsley. I am one of the defendants in this suit. Mr. E. Campbell erected this ice plant for Colley and Billingsley; he was representing the York Manufacturing Company. I didn't work on the plant any, and I don't think Mr. Colley did; Mr. Campbell and a helper we hired for him did the work. We had a Munci oil engine, not sold by Mr. Bauderer but sold under his recommendation, besides what was bought from the York Manufacturing Company. The selling agents for the Munci oil engine were the Indiana Air Pump Company, which was a separate selling agency from the York Manufacturing Company. We divided up the work on installing the engine. I did the carpenter work mostly and put in the *steadying* in the building, and Mr. Campbell put in the ice machinery, and Mr. Colley assisted him and helped put up the engine. Mr. Campbell assisted in putting up this engine; he helped us put it up. We had belting and he recommended the kind of belting to pull the plant with. Mr. Campbell had charge of the plant while it was being erected. We got possession of it by signing an acceptance for it, the plant had been erected and been in operation about a
51 week. Mr. Campbell had been operating it. He said he didn't ever leave a job until he got his papers on it. He said he wasn't allowed to leave a job until he got his papers for it. That is the way he expressed it.

Those three blue prints introduced in evidence are not all that were used on the job by any means; that was not a start of them. Mr. Campbell said the blue prints used in the erection of the plant were his and took them off with him. They didn't come to him; they came to a man erecting a Cuero plant and he got sick and they sent them to Mr. Campbell, and we got orders to turn this mail over to Mr. Campbell.

Mr. Campbell made a remark to the man that was helping him "They are good fellows to get along with; I have had thunder with other men." I said "Let's not put that cooler where the blue print shows it" and he said "All right" and he said "I am instructed to comply with the requests as long as I can," but he says "if there is any kick, to put it according to the blue print." That was his orders. It come up over putting the water cooler next to the ice cans. It was not a convenient place and I asked him to put it on the other side of the wall and he said "All right".

They drew the plans for the erection of the building also. There wasn't a sign of a house and we hadn't bought the land when we

bought the ice machine. They came down there and we told them there was the vacant block of land, and he drawed the plat and told us the height of the building and walls and all.

Cross-examination.

By Mr. Abbott:

We had not bought the land at the time we contracted for the machinery. Hold on. We contracted with another fellow; we first contracted with the Gramania people and afterwards cancelled the contract. The day we contracted with him we asked him to give us dimensions of the building and when he came down we had
52 the building partially erected. When he came there and got the measurements the foundation was in. He didn't want the measurements; he gave us the measurements. We told him it was a sloping hill, and to erect the platform that his plans called for it was out of proportion. He made a bust in there, because there was a three foot incline and he told us the dirt we would take out would fill it up, but it didn't. There wasn't enough dirt to fill it up.

We had no trouble with Mr. Campbell at all; we never crossed him. We only asked him on one particular point to do anything, and he made the remark "Wherever it is convenient I am always glad to put anything to the best advantage". He made the change of this water cooler at our suggestion. The plant was operated about a week after it was completed. I don't know the purpose of the operation; I didn't have any idea. He had Mr. Colley operating the engine and had him sign as engineer at nine o'clock, twelve, three and six, and he had what he called a log that he put these things in and mailed them in to the Company every night. My idea was then they guaranteed that it would make three tons of ice a day, and he was sending it to the house. It was a test to see if it would comply with that. He operated it about a week, I suppose it was.

He said "I want to get off from here Saturday night and I want these boys to run all night so I will get the tank froze down." He says "I can't leave here until the ice is made in that tank, and I will try to get it ready Saturday, and if they will sign my papers I will leave here." The train leaves at six-thirty in the evening, and about three o'clock he asked if we would sign his acceptance and let him off. We sent in his work every day. We signed the acceptance then, and he went away that night and that is the last I ever saw of him.

I can't tell how he came to assist in putting up the engine.
53 My understanding was, he didn't tell me, that ice machine had to run so fast, make a certain speed or something like that, and of course it had to be in line, the engine pulley had to be in line with the gas machine pulley. My understanding was he had to operate this plant, and he was doing it for the York Manufacturing Company. I understood we paid him for it. I considered the reason we had him there that it was a sort of graft they were putting on a fellow. I figured we had to have him, the contract said so. It said they were to furnish a man at Six Dollars a day. They specified the

wages and all expenses. At that time we didn't have anybody there capable of handling that machinery and putting it in; I was not an experienced man myself. It was necessary for us to have somebody to do the work he did, but it wasn't necessary for the York people. I told Bauderer "I can hire an engineer for Three Dollars a day and cut out that Six", and he said "You had better let him come on; they erect them plants and know how." The plant has been in operation ever since. Mr. Colley and myself are not the present owners; we have no interest in it whatever.

The blue prints that were used came by mail to Mr. Campbell.

Defendants rests.

B. H. Loucks, a witness in behalf of the Plaintiff, testified by depositions as follows:

Direct interrogatories:

My name is Bird H. Loucks; residence, York, Pa., my
54 business is Secretary and Treasurer of the York Manufacturing Company. I have held both offices continuously since August 1, 1907. I was connected with the York Manufacturing Company on the 28th day of May, 1912. At that time I held the offices of Secretary and Treasurer of the Company. I am the same person who, under date of May 28th, 1912, as Secretary of said Company signed a contract between said Company and V. B. Colley and J. E. Billingsly, for the sale of certain ice machinery to be delivered at Stockdale, Texas. I recall signing that contract. I was in the office of the York Manufacturing Company, at York, Pennsylvania, when said contract was executed by the York Manufacturing Company, by me as Secretary.

Mr. W. L. Glatfelder, President of the Company, was present when I signed said contract. I have here a true copy of the contract, which I now hand to the Notary and ask to be attached to my deposition. I have signed this copy for the purpose of identification.

I have no personal acquaintance with either V. B. Colley or J. E. Billingsley, the parties who signed said contract. Neither Mr. Colley nor Mr. Billingsley was present when I signed said contract.

I know C. J. Bauderer, whose name appears on the contract referred to. Mr. Bauderer was in the employ of the York Manufacturing Company from November 15, 1909, to August 31, 1912, as one of its travelling salesmen authorized to solicit and take orders for its machinery and to submit them to it for approval. He exercised this authority during the time of his employment. He is not now with said Company. He left its employ on the 31st day of August, 1912. The only authority he had from the York Manufacturing Company with reference to the sale of the property described
55 in the contract sued on or the execution and delivery of said contract, was to take the order by having the purchasers sign it and by signing it himself, and submit it thus signed to the York Manufacturing Company, at York, Pennsylvania, for approval. I do not know what he actually did towards the sale of said property to

Colley and Billingsley, or securing the contract therefor, except that the original contract which we approved is signed and dated in Mr. Bauderer's handwriting. I do not know either A. A. Willke or R. J. Hand, whose names appear on said contract as witnesses to the purchasers and to the York Manufacturing Company. I do not know where they were nor where they lived at the time of the execution of said contract. Neither Mr. Willke nor Mr. Hand was present when I executed the said contract, and neither of them witnesses my signature at the time I signed the contract.

Colley and Billingsley did not sign said contract at the same time and place that I signed it, nor did Colley and Billingsley at any time sign said contract at York, Pennsylvania. I cannot explain how it came that Willke and Hand witnessed my signature and that of Colley & Billingsley. Doubtless their names were there as witnesses when I signed but I do not remember about it.

On the 28th day of May, 1912, at York, Pennsylvania, Mr. Glatfelter, as President, and I, as Secretary, signed said contract, and attached the seal of the Company thereto. By such signing and approval, the contract became the obligation of the York Manufacturing Company.

I do not know where the machinery described in said contract was actually situated at the time of the making of said contract, nor what part of it had been manufactured at that time. All of said machinery was manufactured by the York Manufacturing Company in its works here in York, except the following:

56 Oil cups and oiling attachments mentioned on page 2 of specifications of said contract.

The ammonia gauges and thermometers and other instruments called for on page three of the specifications of said contract.

The ammonia to charge, mentioned on page seven of said specifications.

The brine pump, mentioned at the top of page seven of said specifications, under the heading of Brine Agitator.

The N. P. 2″ cork board, also mentioned on page seven.

The sweet wood charcoal, mentioned on page eight of said specifications.

The can filler and hose, also mentioned on page eight.

The foundation bolts, washers and template for setting same, mentioned on page three of said specifications, were shipped by the York Manufacturing Company from York, Pennsylvania, on June 11, 1912, to the defendants at Stockdale, Texas, by local freight.

All the rest of the machinery mentioned in said contract, except the said ammonia and the said brine pump and the said cork board, was shipped by the York Manufacturing Company, from York, Pennsylvania, to V. B. Colley and J. E. Billingsley, Stockdale, Texas, on June 20, 1912, over the Western Maryland, the Philadelphia and Reading and the Central Railroad of New Jersey via New York and Mallory Steamship Line to Galveston, Texas, and the G. H. & S. A. Railroad to Stockdale.

I do not know where, nor when, nor by whom the said oil cups and oiling attachments, ammonia gauges, thermometers and other

instruments were manufactured. The York manufacturing
57 Company had them in stock here, and shipped them along with the rest of the machinery, as stated above.

I do not know where, nor when, nor by whom the said ammonia to charge was manufactured. It was shipped by the National Ammonia Company from St. Louis, Mo., by local freight, on July 6, 1912, to South Western Engineering & Supply Company, Colley and Billingsley at Stockdale, Texas.

I do not know where, nor when, nor by whom the said brine pump was manufactured. It was shipped from Battle Creek, Michigan, by the Advance Pump and Compressor Company, on June 14, 1912, by local freight, to Colley & Billingsley, Stockdale, Texas.

I do not know where, nor when, nor by whom the said cork board was manufactured. It was shipped by the Armstrong Cork Company from Camden, N. J. by freight, on the 7th day of June, 1912, to Stockdale, Texas, to York Manufacturing Company, c/o Colley & Billingsley.

I do not know where, nor when, nor by whom the said sweet wood charcoal nor the can filler and hose were manufactured. The York Manufacturing Company had them in stock here in York, and shipped them along with the rest of the machinery, as above stated.

Under the provision of the contract wherein it is stated: "The York Manufacturing Company to furnish one erecting engineer at $6.00 per day and expenses to superintend the erection of the machinery, apparatus or plant furnished by it", we furnished, from July 13th to August 9th, 1912, an erecting engineer, Mr. E. Campbell, who was at that time an employee of the York Manufacturing Company travelling out of Chicago under the direction of Mr. F. W. Pilsbry, Manager of our General Western Office at Chicago. Just what was done by Mr. Campbell while on the job, I do not know, as this was under the direction of Mr. Pilsbry.

On or about July 31, 1912, Colley and Billingsly paid Mr. Campbell, on an order from us $100.00 on account of his time
58 and expenses. His time at $6.00 a day, from July 13 to August 9, 1912, amounted to $144.00; his railroad fare and baggage were $15.70, and his board $8.00, making 167.70, and leaving $67.70 of his time and expenses unpaid.

The York Manufacturing Company had not, to my knowledge, anything to do with the erection of said machinery or putting up the apparatus or plant for the defendants, excepting the furnishing of the erecting engineer mentioned in said contract, and as stated in my answers to questions 21 and 22. I have said "to my knowledge", because I do not know what Mr. Pilsbry may have done. In all other respects my answer is unqualified.

The York Manufacturing Company, did not from its main office here in York, employ and labor for the erection of said machinery, nor was said erecting engineer authorized from the main office here to employ any labor for the erection of said machinery. No bills for any such labor were paid by the York Manufacturing Company, nor were claims made against the York Manufacturing Company, for any such labor. Our records disclose nothing whatever on this sub-

ject, excepting the furnishing of the erecting engineer as stated in my previous answers.

The York Manufacturing Company had nothing to do with the operation of the machinery or plant, after the same was erected, except to give directions, through its engineer, Mr. Campbell, for the proper operation of the same. This answer is subject to the same disqualification as to Mr. Pilsby. Mr. Campbell was under his direction.

I, of course, do not know what the erecting engineer did in and about the erection of this plant, but he was not requested, nor required, nor authorized, by the York Manufacturing Company to have anything to do with the erection of any part of the plant, except the machinery which the York Manufacturing Company had sold
59 to the defendants, and which is described in the contract sued on.

The York Manufacturing Company did not have nor employ any labor nor authorize the employment of any labor for the building and erection of said plant.

The defendants did not pay nor advance to the York Manufacturing Company any money for labor performed during the building and erection of said plant, excepting the $100.00 referred to in my answer to the 22nd question, which was paid to Mr. Campbell on the order of the York Manufacturing Company on account of his time and expenses under the contract.

My answers are, of course, subject to the same qualifications as to Mr. Pilsbry. The York Manufacturing Company from its Main Office here did not authorize, nor request, nor require this erecting engineer to have anything whatever to do with the erection of this plant other than as called for in the contract, nor did the York Manufacturing Company at its Main Office here have, nor has it now, any knowledge whatever that anything else was done by its said erecting engineer.

As stated before, I do not know what this erecting engineer actually did on the job, but he was not authorized by the York Manufacturing Company from its Main Office here to assume or claim any control over the machinery after it was installed, nor to refuse to deliver possession of the same to the defendants until they had in writing accepted the same. He was, however, authorized in all cases where he erected or superintended the erection of machinery for the York Manufacturing Company, to request the purchasers to give a written acceptance in order to show their satisfaction. I do not know to what extent this erecting engineer took charge,
60 custody or control of this plant during its construction and erection, nor do I know whether he operated the plant for a time before the defendants signed the acceptance, but he was not authorized, nor requested, nor required by the York Manufacturing Company, from its Main Office here, to do anything whatever in connection with this contract except as provided therein. The York Manufacturing Company at its Main Office here did not have, and has not now, any knowledge that he did anything else.

The defendants paid on account of this contract $621.00. This

was paid about the first of July, 1912. It is credited in their account on the 5th of July, 1912. The defendants are also entitled to credit for freight paid by them on the machinery to Stockdale. This has not been credited, no vouchers for same having been furnished to the York Manufacturing Company. As before stated, they also paid $100.00 on account of the time and expenses of the erecting engineer.

The defendants have not given any note or notes for payment due for said machinery under said contract.

According to our records, the machinery shipped from York, Pennsylvania, under this contract reached Stockdale, Texas, on July 13, 1912; I do not know when the ammonia, brine pump and cork board reached Stockdale.

The defendants have not paid the $621.00 mentioned in said contract as due sixty days after arrival of machinery.

The defendants did not give a note for the $1242.00 mentioned in said contract, for which a six months' note was to be given. I cannot answer why no note or notes were given for the amount due under said contract, as the settlement for the deferred payments under this contract was in the hands of Mr. F. W. Pilbry, Manager of our General Western Office.

I cannot answer whether the defendants refused to pay or
61 give the note for the $1242.00 mentioned in the contract.

Cross-interrogatories:

Our original contract with these defendants was executed, that is, signed, April 24, 1912, by our agent, C. J. Bauderer, representing us. Mr. Bauderer did not represent us particularly at San Antonio, Texas. He travelled out of our Houston Office, soliciting orders in Texas, Louisiana and New Mexico and parts of Mississippi, Arkansas and Oklahoma and submitting them to us for approval. It was to this extent only that he was an agent representing us. As to subsequently ratifying the contract, what we did was this: We considered the terms of the contract and the reports we had concerning the purchasers, and we then signed and sealed the contract as shown on the last page hereof.

C. J. Bauderer never represented us as our manager in Texas. He was employed as a travelling salesman for us in the territory named in my previous answer from November 15, 1909, until August 31, 1912.

We never constructed any ice plants in Texas, but we had up to the time of the making of the contract with the defendants manufactured here the machinery for fourteen ice plants in Texas, and had installed it in the premises of the purchasers in Texas. We had also, up to that time, manufactured here the machinery for 52 ice plants for parties residing in Texas and had superintended the erection of same in their premises in Texas.

It is not true that we had just completed an ice plant in or near Cuero, Texas, when the erection of the one at Stockdale for the defendants was begun. We had sold a plant to Moore and Sames at

Cuero, Texas, which was shipped from here on May 25, 1912, and erected by the purchasers under the superintendence of one
62 of our erecting engineers. The erection of this plant was finished on July 3, 1912.

We kept the contract signed by these defendants and Mr. C. J. Bauderer in our files here until the 4th day of April, 1913, when we sent it to our attorney, Mr. N. C. Abbott. He returned it to us for use in taking these depositions, but asked us to return it to him, and to attach a copy to the deposition, having the Notary compare and state that it is a true copy. For this reason I am not attaching the original to this deposition, but have asked the Notary to attach the copy referred to in my answer to the eighth interrogatory in chief.

We maintained an office in Houston from Aug. 1, 1901, until August 16, 1912, W. E. Becker was in charge of this office at the time of the making of this contract. We carried no stock at this office, but we had a depot in Houston at which we carried at that time a stock of fittings amounting to about $5562.00. Since the 16th day of August, 1912, this stock has been carried on consignment with the South Western Engineering & Supply Company and York Engineering & Supply Company and amounts now to $7,806.-00. These are Texas corporations, entirely independent of us, and were our selling agents for Texas, Louisiana, and New Mexico, and parts of Mississippi, Arkansas and Oklahoma. The York Manufacturing & Supply Company, is now our selling agent in said territory.

None of this material used in the erection of the ice plant in Stockdale came from the Houston office. It was all shipped to Stockdale as set forth in my answer to the twentieth question in chief. We supplied the defendants on or about July 18, 1912, from our Houston stock with two ammonia flanges, two bushings and 6 ammonia return bends, but these were not furnished under this contract nor included in the price thereof and are not involved
63 in this suit, but on a separate order and are charged to defendants on our books at $5.22, the regular price of the same.

The following is a list of the ice plants we erected in the State of Texas prior to the making of this contract:

1908, Alvin Ice & Refrigerating Co., Alvin, Texas, originally sold to City Ice Co., Cuero, Texas.

1910, St. Edwards College, Austin, Texas.

1912, W. B. Walker & Sons, Austin, Texas.

1909, John R. Box, Brownsville, Austin, Texas, originally sold to David Pryor.

1910, Bailey-Hale Co., Corpus Christi, Austin, Texas, originally sold to Bailey-Chandler Company.

1911, Falfurrias Power Co., Falfurrias, Texas.

1912, Harkrider, Keith & Cooke Co., Fort Worth, Texas.

1902, Gulf Fisheries Co., Galveston, Texas, originally sold to Galveston Red Snapper Company.

1901, Houston Packing Company, Houston, Texas.

1912, Dublin Bros., Jacksonville, Texas.

1903, I. J. Nathan, Marlin, Texas.
1908, Central Texas Ict Co., Mexia, Texas.
1910, Bedell-Moore Building, San Antonio, Texas.
1911, McSweeney Packing Co., Sweet Water, Texas.

The York Manufacturing Company manufactures its ice machines at York, Pa., and sells and delivers them to people and corporations in all of the States of the Union, and in many foreign countries, and does so under its right to do an interstate business, but not understanding that the question calls for a list of such plants
64 they are not given.

It is not a fact that we will not allow any one but our own employees to erect these plants under our contracts, but we do insist on having or try to have one of our erecting engineers, familiar with our machinery, to superintend the erection and starting of the apparatus. As a usual thing, neither the purchaser nor their engineers are competent to do this properly without receiving directions and instructions from engineers who are familiar with the system. We did not instruct our employee, Mr. Campbell, not to turn over the plant at Stockdale until the purchasers had given him a written acceptance of the plant, that is, no such instructions were given by us here. What Mr. Pilsbry may have done I do not know.

The San Antonio Machine and Supply Company was never a regular agent of ours; they bought a number of machines from us, and also at times assisted our selling agents in making sales, for which they were compensated by special commission in each case. We dealt with them in this way on several occasions from about January 7, 1907, to about June 22, 1912.

J. M. Mather was in charge of our office in Houston, Texas, from August 1, 1901 to May 8, 1903, and from June 1, 1905 to October 15, 1909; V. H. Becker, from April, 1903, to December, 1903; F. K. Kirker, from December, 1903, to October 1904; Bert Inman, from October, 1904, to July, 1905; George Lane, from September, 1909, to March, 1911; R. L. Fillans, from March, 1911, to June, 1911; W. E. Becker, from June, 1911, to August 16, 1912. Since August 16, 1912, we have not maintained an office in Texas. The South Western Engineering and Supply Company, a Texas corporation, entirely independent of the York Manufacturing Com-
65 pany, was its commission agent for Texas and several other south-western stated from August 16, 1912, to January 23, 1913, when the York Engineering & Supply Company, also a Texas corporation, entirely independent of the York Manufacturing Company, succeeded the South Western Engineering & Supply Company as such agent and is still such agent.

We made at our office here in York plans for the foundation for the ice machine, showing the location of the anchor bolts to fit the holes in the machine; this was a blue print of our regular drawing, which we send out with the machines of this size and style. We made in our Office here a drawing showing how the freezing tank was to be set up and put together, also another drawing showing how the coils were to be placed in the freezing tank and how the dumping apparatus was to be erected on the tank, also another draw-

ing showing how the brine piping was to be put up, also a blue print from one of our standard drawings showing how the distilled water storage tank with the return gas coils was to be put up, also another blue print from one of our standard drawings showing how the double pipe ammonia condensor was to be set up, also another blue print from one of our standard drawings showing how the ammonia receiver was to be set up, also another blue print from one of our standard drawings showing how the distilled water cooler was to be put up, also another drawing showing how the ammonia mains were to be put up and also a drawing showing the location of the various parts of the apparatus on the building of the defendants and some of the outlines of the building as we understood it to be from a blue print made by Mr. Bauderer showing the floor plan and the outlines of a front and side elevation. These plans, drawings and blue prints, excepting the one made by Mr. Bauderer were all made in our Drafting Room here at York. We made no plans for the building.

66 Mr. Bauderer did not, to my knowledge, draw any of the plans by which the building was erected. The only plan or drawing made by Mr. Bauderer and received by us was the blue print which I have just referred to. It showed only enough of the building to enable us to locate the various parts of the ice plant. It showed in four lines the floor plans with marks showing the location of the partition and windows and doors, and the location of the various parts of the apparatus according to his idea. It showed in six lines an end elevation of the building, and it showed in five lines a side elevation. This side elevation showed in four additonal lines one of the walls referred to and the bottom floor of the ice storage room and the top end of the freezing tank.

Our present form of contract, as well as that which we used when this contract was made, requires the purchaser to furnish and erect new buildings, or to make necessary changes in his existing buildings according to plans to be submitted and approved by us. That is all we require in any case. The ice plant at Stockdale, by which I mean the machinery furnished by us, was erected according to our plans. I have never seen it but have no doubt this is so. But if you mean to include the buildings in your question, they were not erected according to our plans. They may have been erected in such a way as to correspond with the general dimensions given in Mr. Bauderer's blue print, but I should not call those plans for the erection of a building. The building might have been erected according to the location plan which was made in our office and to which I have referred in my last answer. This shows some of the framework as well as outlines corresponding with Mr. Bauderer's blue print, and the building could have been erected according to this plan by adding parts not shown.

67–72 I hereto attach a copy of the charter of the York Manufacturing Company. This Company was incorporated in the State of Pennsylvania on the 5th day of March, 1895. Acting under its Charter the York Manufacturing Company manufacturers ice plants, and sells and delivers them to different people and

corporations in all of the States of the Union, and in many foreign countries, and does so under its right to do an interstate business.

* * * * * * *

73 No. 1847.

YORK MANUFACTURING COMPANY
vs.
V. B. COLLEY et al.

It is hereby agreed by and between the attorneys for the respective parties in the above numbered and styled cause that the above and foregoing statement of facts contains a full true and correct statement of all the material facts proven upon the trial of said cause.

Dated this 29th day of May, A. D., 1914.

JAMES A. KING,
Attorney for Defendants.
N. C. ABBOTT,
Attorney for Plaintiff.

I hereby approve the above and foregoing statement as a full, true and correct statement of all material facts proven upon the trial of the above numbered and styled cause.

Dated this 29th day of May, A. D. 1914.

F. G. CHAMBLISS,
Judge 36th Judicial District of Texas.

Filed in the Court of Civil Appeals at San Antonio, Texas, Aug. 18, 1914. Jos. Murray, Clerk. No. 5363.

74 THE STATE OF TEXAS,
County of Wilson:

At a term of the District Court, begun and holden at Floresville within and for the County of Wilson before the Hon. F. G. Chambliss, and ending on the 30th day of May, A. D. 1914, the following case came on for trial, to-wit:

#1847.

YORK MANUFACTURING COMPANY
vs.
V. B. COLLEY et al.

Last Amended Petition of Plaintiff.

In the District Court of Wilson County, Texas.

#1847.

YORK MANUFACTURING COMPANY
v.
V. B. COLLEY et al. and J. E. BILLINGSLEY, and MRS. MEDORA R. COLLEY.

Now comes the plaintiff, York Manufacturing Company, and files this its second amended petition in vacation, making Mrs. Medora R. Colley an additional defendant, and alleges and says:

1. Plaintiff is a corporation organized under the laws of the State of Pennsylvania, and as such corporation was authorized to and engaged in the business of manufacturing and selling ice machinery, and as such was doing a general and foreign and interstate business, and was by its articles of incorporation authorized to do and perform all things hereinafter mentioned.

2. The defendants are residents and citizens of the County of Wilson, State of Texas.

3. Plaintiff further represents to the court that on or about
75 the 29th day of May, 1912, the plaintiff and the defendants, Colley and Billingsley entered into a contract in writing by the terms of which the plaintiff agreed at York, in the State of Pennsylvania, to construct for and deliver to the defendants at the railroad station, at Stockdale, Texas, the machinery, apparatus and property, hereinafter described, for use in the ice plant of the defendants, at the said Stockdale, Wilson County, Texas, as follows:

One Ice Machine with the following specifications:

Two Gas Pumps, patented improved 1912 inclosed single acting type, 7½ inches bore, 7½ inches stroke, fitted with cooling jacket and properly lagged.

Latest improved stuffing boxes.

One duplicate set of pump valves.

Special by-pass valves and pipes on machine between pumps, enabling charge of ammonia to be drawn from one part of pipe system and stored in another part.

Main shaft of best forged and hammered steel 4 inches in diameter.

One fly wheel 42 inches in diameter, to weigh about 1300 pounds, and loose pulley.

Details.

Connecting rods and all parts of steel.
Oil cups and oiling attachments for continuous running.
Steel piston rods.
Pump frames of our standard vertical style.
Compressors driven by belt.
Piston fitted with metal-ic packing.
All wearing and bearing surfaces fitted with automatic oilers.
Machine will be complete as usually furnishd by us.

76 Ammonia Gauges.

One set of ammonia pressure gauges, one for high pressure and one for low pressure, set on ornamental plate, wrenches, small tools and tool board.

One set of wrenches and small tools for taking the machine apart for examination or to make adjustments of any part of pumps.

One tool board arranged to receive above tools.

Thermometer and Other Instruments.

One glass test jar, one hydrometer for testing ammonia, and one chamical hand thermometer and, where brine is used, one salt gauge for testing density of brine.

Compressors.

Frame 1912 inclosed vertical type.
Cylinder two, each 7½" x 7½".
Suction pipe 1½".
Discharge pipe 1½".
Suction valves, each head one.
Discharge valves, each head one.
Main bearing—Length of main bearing 16". Length of out bearing 9".
Crank pin 4" Diameter x 3¾" long.
Shaft 4" in diameter at bearing.
Wheel 42" diameter, weight 1300 pounds.
Crank center cra-k type.

Ammonia Condensers.

Will be our improved double pipe style, and will consist of one coil of 1¼ x 2" ammonia pipe. Each coil will be 10 pipes high, about 19 feet long, and will be provided with needed valves, headers, and water distributing devices.

77 Ammonia Receiver and Oil Separator.

One ammonia receiver 12″ x 6″ Oil Separator 8″ x 42″. Separator and receiver will be of our latest improved style.

Ammonia Pipe, Valves, Connections and Fittings.

All valves, fittings and ammonia pipe needed to connect the compressor pumps with the condensor and receiver.

Freezing Tank.

One freezing tank made of tank steel ¼ inch thi*n*k and to be 22′9″ *feet* long, 8′6″ *feet* wide, 28 inches high.

All sheets, angle iron, and other parts of above tank will be formed and punched before shipment, ready to rivet in place on premises of purchaser.

Evaporating Coils and Cans in Tank.

960 feet of evaporating coils of 1¼ inch ammonia pipe, complete with stands, expansion valves, headers, couplers and fittings, ready to assemble on premises of purchaser.

Said coils will be fitted to freezing tank and so arranged that 60 cans (size 11½ x 22½ x 32) can be placed therein.

Needed ammonia pipe and connections for connecting said coils with the ammonia receiver and suction machine.

Wood Framework and Covers.

Suitable wood framework arranged to receive cans also a wooden cover for each can, said framework to be shipped in knocked form.

Purchaser will furnish and install other woodwork.

Freezing Cans.

61 galvanized freezing cans, size 11½ x 22½ x 32. Cans will weight about 57 pounds each, and will have a capacity to make a block of ice to weigh about 200 pounds.

78 Hoists, Cranes, Can Lifter and Training Apparatus.

One geared hand hoist and traveling crane, with iron work for same complete. Purchaser to furnish and install the woodwork for same.

One thawing apparatus for size suitable for can used.

Brine Agitator.

One brine pump for circulating brine in freezing tank with distributing pipes, bulk heads or partitions inside tank.

Ammonia to Charge.

300 pounds ammonia and charge system with same.
1100 square feet of N. P. 2" Corkboard.
Foundation bolts and Template.

Exhaust Steam Distilling, Purifying and Cooling Apparatus.

One cooling coils with needed water distributing pipes.
One distilling water filter with full charge of sweet wood charcoal.
One storage tank with ammonia coil.
One can filler with needed feet of 1¼ inch hose.
One erecting engineer to superintend work for such time as needed at $6.00 per day, and expenses.

4. The said contract of purchase and sale was made at York, Pennsylvania, approved by it at said place in the manner provided for in said place in the manner provided for in said contract, the shipment thereof, to be made 30 days after approval of contract.

79 5. The defendants promised and agreed to pay to the plaintiff for the material and property above mentioned the sum of $2,484.00, with the salary and expenses of the said engineer in addition thereto, payable as follows:

Cash on shipment of machinery $621.00.
Cash 60 days after arrival of machinery $621.00.
Balance of the amount above mentioned to be evidenced by one note of $1242.00, to be drawn for a period of six months, and to bear six per cent interest, and to be dated and delivered at the time of second payment. The salary and expenses of the engineer to be paid for as earned and expended.

6. Plaintiff performed its part of said contract, delivered to the defendants, according to the terms of said contract, all of the machinery, material and property, including the services of the engineer aforesaid, called for in said contract, and the same was received and accepted by the said defendants, and by them placed in their ice plant at the place aforesaid, and on or about the 10th day of August 1912, accepted the same in writing, as having been completed and put in working order.

7. Plaintiff further says that the defendants have paid to the plaintiff the first installment of $621.00 due according to said contract, and in addition thereto have paid this plaintiff $100.00 on the salary and expenses of the said engineer; they have failed and refused to make the second payment of $621.00, and have failed, refused and neglected to evidence the balance of the money due under the contract price by a promissory note, as they agreed therein to do, or pay the balance due for the services and expenses of the said engineer, as hereinafter more specificaly set out, and they have failed and refused to pay, in any manner or form, the balance due on said contract, although often requested so to do, and all the purchase price under said contract remains unpaid except the said first payment of $621.00 and the $100.00 paid on the salary and expenses of said engineer.

80 8. The said contract contains a provision in the words and figures following:

In case of failure or refusal by the party of the second part (defendant) to make the payments, or any of them, when due under this contract, or make settlement by the execution and delivery of notes of other obligations as hereinbefore agreed, or to pay any of said notes or obligations when the same shall fall due, then the whole of the unpaid portions of the purchase money, however secured and whenever payable, arising under this contract, shall thereby at the option of the said party of the first part (plaintiff) become immediately due and payable; and in case of such default, the party of the first part shall thereupon have the right if it so elects to enter upon the premises upon which such machinery, apparatus or plant is installed and by its agents, representatives and employes take possession of and remove the same, and the party of the second part shall afford every facility therefor; and in case said machinery, apparatus or plant shall be taken by the party of the first part under this agreement by reason of such default then the party of the second part shall pay all expenses incurred in installing and removing the same, and for all damages to the same arising from wear and tear, and such further sum as will reasonably compensate the party of the first part for the use of rental of said machinery, apparatus or plant.

9. Plaintiff further alleges that by reason of such default in the failure to pay the second installment of money due as per said contract, give their note for or pay the balance of said contract price, to-wit: $1242.00, and pay the balance of the amount due for such engineer as salary and expenses, the plaintiff has exercised its option, and elected to declare the whole of said indebtedness due and payable, as per the term of said contract, and does hereby so declare.

10. There is due on said contract the sum of $1863, together with six per cent interest thereon from August 10th, 1912 and also the sum of $67.50 balance due on account of salary and expenses
81 of engineer furnished under the terms of said contract, with interest thereon from the date last aforesaid, and plaintiff has incurred expenses because of the default of the defendants to the amount of more than ten per cent of the amount unpaid, including therein attorneys fees for this foreclosure, which amount is reasonable for expenditures and services rendered.

11. Plaintiff further says that it furnished an engineer in accordance with the provisions of said contract, and performed 24 days service for which defendants by said contract agreed to pay $144.00, and the actual expenses of said engineer during said time, for which defendants agreed to pay, was $15.70, aggregating the sum of $167.70, upon which defendants paid the sum of $100.00 and no more, and the balance of $67.70 is still due and payable.

12. Plaintiff further alleges that by the terms of said contract it was expressly agreed that the title and ownership of the machinery, apparatus and property therein contracted for should remain in the plaintiff, York Manufacturing Company, until the entire purchase price therein agreed to be paid, and all notes and other securities given to secure the same or any part thereof, shall be actually

paid in cash; and in case of failure or refusal by the party of the second part (defendants) to make the payments or any of them, when due under this contract, or make settlement by the execution and delivery of notes or other obligations as therein agreed, or to pay any of said notes or obligations when the same shall fall due, then the whole of the unpaid portion of the purchase money, however secured and whenever payable, arising under said contract, shall thereby at the option of plaintiff become immediately due and
82 payable and in case of such default the plaintiff shall have the right if it so elects to enter upon the premises upon which said machinery, apparatus and property was installed, and, by its agents, representatives, and employes take possession and remove the same, and the said defendants should afford every facility therefor; and plaintiff further alleges that upon said default of the said defendants, as hereinbefore alleged, is elected to take the said property and remove the same, and demanded the right so to do, in accordance with the terms of said contract, and defendants refused such right, and thereby further breached the terms of said contract; that by reason of said agreement so reserving the title to said property, the plaintiff has a lien on the said machinery, apparatus and property for the unpaid part of said contract price, and it is entitled to a foreclosure thereof.

13. Plaintiff further says that the said contract has been duly filled for record, and properly recorded and entered in the office of the Clerk of the County Court of Wilson County, Texas.

14. Plaintiff further alleges that it is at this time unable to give the exact description of the real estate on which the plant of defendants is situated in Stockdale, Wilson County, Texas, but will furnish a description thereof at or before the trial hereof.

15. Plaintiff further says that before the execution and delivery of said contract, and as a part consideration for the acceptance thereof by plaintiff the defendant, Mrs. Medora R. Colley contracted in writing with the plaintiff to guarantee the payment of the amount of said contract price, whereby she became liable to the
83–83*c* plaintiff for the amount of the contract price of said machinery, and she has failed and neglected to pay the same.

Wherefore, premises considered, plaintiff prays that citation issue hereon for the defendant, Medora R. Colley, in term of law, requiring her to answer herein on or about the first day of the next term of this court, and that upon final hearing hereof the court may find the amount due plaintiff from all of the defendants, and plaintiff have judgment therefor, and that the same be declared a lien on the property described herein and in said contract, and that said lien be foreclosed and ordered sold by the sheriff and the proceeds applied to the costs of Court, and the amount due plaintiff, and for ich other and further relief as plaintiff may be entitled to including interest and costs of court.

N. C. ABBOTT,
Attorney for Plaintiff.

STATE OF TEXAS,
County of Harris:

N. C. Abbott, being duly sworn on oath says that he is attorney of record for the plaintiff in the foregoing cause; that he knows the contents of the foregoing petition and believes the facts therein stated to be true.

N. C. ABBOTT.

Subscribed and sworn to before me this 7th day of April, 1914.

____ ____,
Notary Public, Harris County, Texas.

* * * * * * *

84 2. *Last Amended Answer of Defendants.*

THE STATE OF TEXAS,
County of Wilson:

#1847.

In the 36th Judicial District Court for Said County.

YORK MANUFACTURING CO.
vs.
V. B. COLLEY et al.

Now comes V. B. Colley and J. E. Billingsley named as defendants in the above entitled and numbered cause, and in vacation filed this, their amended plea in abatement jointly and severally appearing under protest for the purpose of this plea, and for no other purpose, and specially and solely to object to the power of the plaintiff to compel them to appear and answer in the aforesaid action, by protestation, not confessing, nor admitting all or any of the matters and things in the said plaintiff's Original Petition and Amended Petition, to be true in such manner and form as the same or therein and thereby specified and alleged, and for plea says this court ought not to compel them or either of them to appear or to answer in the aforesaid action for the following good and sufficient causes, to-wit:

I.

These defendants say that on the 24th. day of April, A. D. 1912, and long prior thereto the plaintiff, York Manufacturing Company was a corporation organized for pecuniary profit under and by virtue of the laws of the State of Penna., and that on said date said corporation was desirious of transacting business in this State and did
and had theretofore transacted business in this State and de-
85 sired to transact and to solicit business in this State and that
it had established a general and special office in this State, and that it had in no way, manner or form complied with article 1314 and 1318 of the Revised Statutes of Texas, and on the 24th.

day of April, A. D. 1912, the said York Manufacturing Company had not then nor has it now any permit to do business in this State, nor has it ever filed its articles of incorporation under provisions of the Statutes of this State in the office of Secretary of the State for the purpose of procuring its permit. That on the date aforesaid said plaintiffs was engaged in carrying on the business of the construction and erection of ice making and refrigerating plants and was so engaged in the State of Texas, and these defendants say that said business was carried on by said plaintiff and was conducted and prosecuted by said company; and was then and is now wholly unlawful in this, to-wit:

II.

That on the day and date aforesaid these defendants entered into a contract with the plaintiff by and through its local agents and employees in the City of San Antonio, Texas, for the construction and erection of an ice making and refrigerating plant in the town of Stockdale and will more fully appear hereinafter and that at the time of the execution of said contract said transaction and the dealings then and there subsequently had by and between the plaintiff and these defendants was in no manner or form interstate commerce, but said busiess was solely of the nature of material furnished and labor performed in this State which constitutes the doing and carrying on of business in this State by said Plaintiff without authority of law. These defendants attached hereto a certificate by the Secretary of the State of the State of Texas to the effect that said
86 plaintiff has not filed its articles of incorporation in this State, which said certificate is attached hereto and marked "Exhibit A," and made a part of this plea.

III.

These defendants further say that on the 24th. day of April, A. D., 1912, in the City of San Antonio, Texas, they entered into a contract with the plaintiff for the erection and construction of one certain ice plant in the town of Stockdale; that said contract was in writing and based upon specification of the material and machinery to be used in said plant and upon drawings and blue prints furnished by the said plaintiff, its agent and employees whereby the plaintiff obligated itself to furnish, construct and place in perfect running order an ice plant for the defendants as aforesaid; and among other specifications of the said plant and items of said contract there *is* the following provisions:

"The York Manufacturing Company to furnish one erecting engineer at $6.00 per day and expenses to superintend the erection of the machinery, apparatus or plant furnished by it; the purchaser to furnish one engineer to assist in erecting and putting machinery apparatus and plant together and to receive and carry out instructions from the York Manufacturing Company in the handling of the same. The York Manufacturing Company to have entire charge of the plant during the erection of same, and when ready for operation it

shall be operated in accordance with the directions given by the representative or engineer of the York Manufacturing Company. The York Manufacturing Company or its representatives, will furnish a written notice to purchaser of the time when the plant
87 is ready for charging. The limit of time which the York Manufacturing Company's engineer is to remain with the plant for the purpose of instructing the purchaser's men and making needed adjustments to the machinery and apparatus or plant shall be — days from the date the plant is ready for charging and if detained beyond that period through no fault of the York Manufacturing Company, the purchaser shall pay for his services and the services of his assistants, after the expiration of said period, at the rate of $7.00 per day and all expenses for each man. If the full operation of the machinery, apparatus or plant shall be postponed beyond the above mentioned period, then, at the expiration of said period, the purchaser agrees to make payment of the entire contract price, in like manner as if the machinery, apparatus or plant, had been fully operated and accepted by the purchaser. The purchaser hereby agrees to employ none but careful and competent employees, and to properly operate the machinery, apparatus or plant, to furnish needed engineers, firemen, fuel, steam, water, oil, waste, and other incidentals requisite or proper for the purpose, and shall at all times render friendly assistance, as and when requested by the York Manufacturing Company."

IV.

Said contract also contained the following guarantee of workmanship and material.

"The York Manufacturing Company guarantees workmanship and material for one year (natural wear, tear and accident excepted) provided no disarrangement of or injury to machinery apparatus or plant, herein contracted for, be caused by incompetency, carelessless or want of attention, or by the use of improper
88 supplies, and further provide that the said machinery, apparatus or plant shall have been operated in a proper manner and in accordance with the York Manufacturing Company's instructions; and in case and damage by caused by any part or parts of the machinery, apparatus or plant herein specified proving defective, the York Manufacturing Company's liability will be limited to repairing such defective parts or furnishing a duplicate of the same, free to of charge to the purchaser."

V.

Said contract contained a further provision which in substance was to the effect that said plaintiff granted the said defendants a franchise or right and liberty to use certain patents upon various portions of the machinery and apparatus used in said plant.

VI.

Said contract also contained the following provisions.

"If for a period of thirty days after the machinery, apparatus or plant, furnished hereunder, is erected ready to charge, the purchaser shall fail to notify the York Manufacturing Company in writing of any claim that the said machinery, apparatus or plant as furnished, does not fulfill the terms and requirements of the contract, specifying in what particular or particulars it failed, this shall, in itself, be considered an acknowledgement by the purchaser that the said machinery, apparatus or plant, as furnished, does fulfill the said terms and requirements and shall constitute a complete acceptance of the same as fulfilling all the terms and requirements of the contract.

In case the purchaser shall notify the York Manufacturing
89 Company within thirty days after the machinery, apparatus or plant furnished hereunder, is ready for charging, that the same does not fulfill the terms and requirements of the contract, specifying in what particular or particulars it fails, then a reasonable time shall be allowed the York Manufacturing Company in which to remedy any defects or deficiencies that may be found by it to exist, in order to make it fulfill the said terms and requirements, but in such case, the time consumed by the York Manufacturing Company in remedying such defects or deficiencies shall correspondingly postpone the deferred payments to be made for such machinery, apparatus or plant. In any event if the parties hereto are unable to adjust amicably such disputes as may arise between them under this contract, then the York Manufacturing Company, if it so elects, shall have the privilege of removing the same machinery, apparatus or plant at any time after (30) days' notice given to the purchaser of its intention to do so; provided that the expense of such removal shall be paid by the York Manufacturing Company, and that it shall refund or offer to refund to the purchaser all money paid to it on account of the said machinery, apparatus or plant; and in such event the purchaser hereby expressly agrees to permit the York Manufacturing Company, but its agents, representatives, employees, to enter upon and remove the- from premises in or on which the same is erected or installed, all machinery, apparatus or plant furnished hereunder; and in the event aforesaid, the refunding, or the tender by the York Manufacturing Company to the purchaser of all money paid to it by the purchaser under this contract shall operate as a full complete release and discharge of the said York Manufacturing Company from all damages or liability under this contract, and shall be a full and complete settlement between the parties of all claims thereunder.

90 The York Manufacturing Company reserves the right to change the construction or design of the machinery, apparatus or plant, if in its judgment such change is to the interest of all parties and does not vary the results.

Neither party shall be bound in any way by an ex parte test of the machinery or apparatus made by the other party."

VII.

Said contract specifications and blue prints are hereto attached and marked "Exhibit B" and made a part of this plea as fully and completely as if they and all of them and the contents thereof were set out verbatim.

VIII.

The defendants further aver that in the construction of said plant by the said plaintiff it furnished among other labor its construction engineer who had absolute control of the erection of the said plant and that these defendants at the special instance and request of plaintiff paid and advanced money to the employees of said plaintiff for labor performed during the building and erection of said plant.

IX.

These defendants further allege that at the date of the execution of the contract aforesaid prior thereto and subsequent thereto plaintiff has maintained an office and stock of goods, wares and merchandise in the City of Houston, Harris County, Texas, and that during the building of said ice plant certain material was shipped from said Houston office to the town of Stockdale, and was used by plaintiff in the construction and erection of said plant.

X.

These defendants further allege that at the time of the
91 execution of the contract aforesaid one C. J. Bauderer, was the Special Agent and representative of the plaintiff whose office was in San Antonio, Texas, and who opened the negotiations with the defendants for the erection of the said ice plant and who executed the contract for the plaintiff company, which said contract was made and entered into in the State of Texas as hereinbefore alleged.

XI.

These defendants further allege and say that the material furnished and the labor performed by the plaintiff under the contract was the furnishing the material and the erection thereof of an ice plant for these defendants hereinbefore alleged and that shortly after the execution of said contract the said plaintiff erected ice plant as called for and designated in the contract hereinbefore to and that the labor performed upon said plant by the plaintiff was skilled labor and the erection of ice and refrigerating plants are highly technical and require persons skilled and informed in their proper construction and that these defendants were not skilled and informed in the mechanism and construction of ice plants which was well known to the plaintiff at the time of the entering into the contract aforesaid and said plaintiff being aware of said fact executed the

contract as aforesaid and furnished the material and labor for the said plant and erected said ice plant and the said contract is now an executed one and that the said plant should be constructed as hereinbefore alleged which was the construction placed upon it by all the parties thereto and especially these defendants.

XII.

These defendants further allege that after said ice plant was erected and after the said machinery was installed the plain-
92 tiff through its agent refused to deliver possession of said plant to these defendants until they had in writing signed and acceptance of the same and that during the construction and erection of said plant these defendants had no charge, custody or control of the same, but all of which was in the hands of the plaintiff, and that after the erection of said plant said plaintiff by its agent and employees operated said plant for a time before these defendants signed the acceptance as aforesaid.

All of which matters and things these defendants aver to be true and are ready to maintain and prove, wherefore these defendants pray judgment of this honorable court whether the Court here will or ought to have or take further cognizance of this action.

JAMES A. KING,
Attorney for Defendants.

THE STATE OF TEXAS,
County of Wilson:

Personally appeared before me the undersigned James A. King, the attorney of the record for the defendants in the above styled and numbered cause who being duly sworn as to the truth of the allegation in the above plea, says that he has read the foregoing plea and known to the contents thereof and that the same are true and of his own knowledge, except as to the matters therein stated on information and belief, and as to these matters he believes them to be true.

JAMES A. KING.

Sworn to and subscribed before me this the 5th day of December, A. D., 1913.

[L. S.]

M. H. WEST,
Notary Public, in and for
Wilson County, Texas.

93 Should the above and foregoing Plea in Abatement be overruled, and these defendants required to answer further, herein, then they deny each and every allegation in the Plaintiffs petition contained and demand strict proof thereof.

JAMES A. KING,
Attorney for Defendant.

"EXHIBIT A."

The State of Texas, Department of State.

I, C. C. McDonald, Secretary of State of the State of Texas, do hereby certify, That an examination of the records of this office shows that York Manufacturing Company of Pennsylvania, has failed to file in this Department its Articles of Incorporation.

In Testimony Whereof, I have hereunto signed my name officially and caused to be impressed hereon the seal of the State at my office in the city of Austin, Texas, this the 4th day of September, A. D., 1912.

[L. S.]

C. C. McDONALD,
Secretary of State.

94 "EXHIBIT B."

York Manufacturing Company.

Manufacturers of Ice Making and Refrigerating Machinery For All Purposes.

Works and General Office: York, Penna.

Established 1875. Incorporated 1894.

M-197-A-12-11-4500.

York Manufacturing Company.

Manufacturers of Ice Making and Refrigerating Machinery.

Works and General Office: York, Pennsylvania.

Proposal and Specification.

Dated April 24, 1912.

To V. B. Colley and J. E. Billingsley, Stockdale, Texas, Wilson County:

95 We hereby propose to furnish you machinery and apparatus in accordance with the following specification.

YORK MANUFACTURING COMPANY AND

——— ———.

Page 1.

M-198-A. 12-11-4500.

Proposal and Specifications.

York Manufacturing Company will furnish One Machine same to be in accordance with the following specifications:

Gas Compression Pumps.

Two Gas pumps of our patented improved 1912, inclosed single acting type, 7½ inches bore 7½ inches stroke, fitted with cooling jackets and properly lagged.

Pumps fitted with special ammonia stop valves, with main pipe connections.

Latest Improved stuffing boxes.

One duplicate set of pump valves.

Special by-pass valves and pipes on machine between pumps enabling charge of ammonia to be drawn from one part of pipe system and stored in another part.

Main Shaft.

Of best forged and hammered steel 4 inches in diameter.

Fly Wheel.

One Fly-wheel 42 inches in diameter, to weigh about 1300 pounds, and loose pulley.

96 Details.

Connecting rods and all parts of steel.

Oil cups and oiling attachments for continuous running.

Steel piston rods.

Pump frames of our standard Vertical style.

Machine No. 1.

YORK MANUFACTURING COMPANY AND
V. B. COLLEY AND
J. E. BILLINGSLEY.

M-199-A. 12-11-4500.

Proposal and Specification.

Compressors driven by belt.

Pistons fitted with metallic packing.

All wearing and bearing surfaces fitted with automatic oilers.

Machine will be complete as usually furnished by us.

Ammonia Gauges.

One set of ammonia pressure gauges, one for high pressure and one for low pressure, set on ornamental plate.

Plans, Foundation Template and Bolts.

Complete plans will furnish for foundations and for erecting the apparatus to suit the premises.

Foundation bolts with anchor washers and template for setting same.

Purchaser will furnish thimbles for around foundation bolts.

Wrenches, Small Tools and Tool *Boars.*

97 One set of wrenches and small tools for taking machine apart for examination or to make adjustments of any part and pumps.

One tool *boars* arranged to receive the above tools.

Finish and Painting.

All parts of the machine that are machine tooled will generally be polished.

Machine will be given a priming coat of paint before shipment. After machine is erected upon its foundation purchaser will tastefully paint and varnish the same.

Thermometers and Other Instruments.

One glass test jar, one hydrometer for testing ammonia and one chemical hand thermometer and, where brine is used, one salt gauge for testing density of brine.

Guarantee of Duty for Machine.

The York Manufacturing Company hereby guarantee that this machine, consisting of the herein described gas pumps, under test will give a duty equal to the melting of 11 tons of ice in twenty four hours, when operating under 15.67 pounds back pressure and 185 pounds condensing pressure.

YORK MANUFACTURING COMPANY AND
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Machine No. 2.

Page 3.

M-472-A. 12-11-2500.

Proposal and Specification.

98 *Detail Schedule.*

Compressor.

Frame 1912 inclosed vertical type.
Cylinder-, Two—each 7½ x 7½.
Suction pipe 1½".
Discharge Pipe 1½".
Suction Valves, each head One short.
Discharge Valves, each head one.
Main Bearing Length of Main Bearing 16".
Length of out board bearing, 9".
Crank Pins, 4" Diameter x 3¼" long.
Shaft 4" in Diameter at bearing.

Wheel 42" diameter, weight 1300 pounds, Face 8½".
Crank center crank type.

Detail Schedule.

Page 4.

YORK MANUFACTURING COMPANY AND

——— ———.

M-200-A. 12-11-4500

Proposal and Specification.

Ammonia Condensers.

Will be our improved double pipe style, and will consist of one coils of 1¼" x 2" ammonia pipe. Each coil will be 10 pipes high, about 19 feet long, and will be provided with needed valves, headers, and water distributing devices.

Purchaser will furnish and install suitable water tight floor
99 or pan with needed drains.

Ammonia Receiver and Oil Separator.

One ammonia receiver 12" x 6'. One oil separator 8" x 42". Separator and receiver will be of our latest improved style.

Ammonia Pipe, Valves, Connections, and Fittings.

All valves, fittings, and ammonia pipe needed to connect the compressor pumps with the condenser and receiver.

Condensing Water.

The purchaser hereby agrees to supply needed water to all parts of the apparatus at all times.

Guarantee of Condenser Capacity.

The York Manufacturing Company guarantees that the above Ammonia Condenser under test will have refrigerating capacity of 12½ tons with water at 7 deg. Fahr.

Ammonia Condensers and Fittings.

YORK MANUFACTURING COMPANY AND

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Page 5.

M-203-A. 12-11-4000.

Proposal and Specification.

Freezing Tank.

York Mfg. Co. will furnish one freezing tank made of
100 tank steel ¼ inch thick, and to be 22' 9" feet long 8' 6" feet wide 38 inches high. All sheets, angle iron, and other parts

of above tank will be formed and punched before shipment, ready to rivet in place on premises of purchaser.

Evaporating Coils and Cans in Tank.

York Mfg. Co. will furnish 960 feet of evaporating coils of 1¼ inch ammonia pipe, complete with stands, expansion valves, headers, couplers and fittings, ready to assemble on premises of purchaser.

Said coils will be fitted to freezing tank and so arranged that 60 cans (size 11½ x 22½ x 32) can be placed therein.

York Mfg. Co. will furnish needed ammonia pipe and connections for connecting said coils with the ammonia receiver and suction of machine.

Wood Frame Work and Covers.

York Mfg. Co. will furnish suitable wood framework arranged to receive cans, also a wooden cover for each can, said frame-work will be shipped in knocked down form. Purchaser will furnish and install all other woodwork.

Freezing Cans.

York Mfg. Co. will furnish 61 galvanized freezing cans, size 11½ x 22½ x 32. Cans will weigh about 57 pounds each, and will have a capacity to make a block of ice to weigh about 200 pounds.

All cans will be riveted and soldered, and will have wrought iron band at the top.

Hoists, Cranes, Can Lifter, and Thawing Apparatus.

York Mfg. Co. will furnish one geared hand hoist and traveling crane, with ironwork for same complete. Purchaser will furnish and install the woodwork for same.

101 York Mfg. Co. will furnish one thawing apparatus of size suitable for can used.

YORK MANUFACTURING COMPANY AND

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Can System No. 1.

Page 6.

M-204-A.

12-11-4000.

Proposal and Specification.

Brine Agitator.

York Mfg. Co. will furnish one brine pump, belt driver, for circulating brine in freezing tank, with distributing pipes, bulk heads or partition inside tank.

Purchaser will furnish power to drive agitator.

Insulation of Tank and Flooring.

Purchaser will *probably* insulate and do the wood curbing of freezing tank.

Purchaser will provide foundations and properly insulated tank floor.

Ammonia to Charge.

York Mfg. Co. will furnish 300 pounds ammonia and charge system with same.

102

Brine Material.

Purchaser will furnish needed salt brine of 80 per cent density salt scale and charge system with same.

Guarantee of Capacity.

The York Manufacturing Company guarantees that the above freezing system under test will have a capacity of making Three tons of ice per day of 24 hours with the water entering the cans *ar*- 40 deg. or less, when properly and continuously operated.

York Mfg. Co. will furnish 1100 square feet of N. P. 2" Corkboard.

Foundation bolts and ten plate, to be forwarded 3 days after approval of contract.

YORK MANUFACTURING COMPANY AND

———— ————.

Can System No. 2.

Page 7.

M-205-A. 12-11-4000.

Proposal and Specification.

Exhaust Steam Distilling, Purifying, and Cooling Apparatus.

York Mfg. Co. will furnish the following apparatus for utilizing exhaust steam to make distilled water for filling ice cans.

One cooling coil*s* with needed water distilling pipe.

One distilled water filter*s* with full charge of sweet wood charcoal.

One storage tank with ammonia coil. Purchaser will
103 property insulate the tank and furnish insulated cover for same.

One can filler*s* with needed feet of 1¼ inch hose.

Purchaser to furnish and install suitable water-tight floor pans with drains wherever needed for the above apparatus.

The pipe and connections for conveying the distilled water in the above apparatus will be furnished by Purchaser.

Steam Pipes.

Purchaser will furnish steam pipe with valves and fittings needed to connect the machine, pump and other apparatus to.

Exhaust Steam Pipes.

Purchaser will furnish exhaust pipe with valves and fittings needed to connect the machine, pump and other apparatus to the steam condenser.

Guarantee of Capacity.

The York Manufacturing Company provided said steam be suitable for making ice and capable of purification by ordinary distillation with the above apparatus and without resorting to special treatment in which case purchaser agrees to furnish at his own expense needed special or other apparatus not herein specified; the cooling coils to be of sufficient capacity to reduce the distillate to 70 deg. and the storage tank to further reduce it to 40 deg. Fahr.

104 YORK MANUFACTURING COMPANY AND

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Distilling System.

Page 8.

M-214-A. 12-11-3500.

Proposal and Specification.

Erecting of Machinery, Putting in Operation, etc.

The York Manufacturing Company to furnish one engineer at $6.00 per day and expenses, to superintend the erection of the machinery, apparatus or plant furnished by it; the purchaser to furnish one engineer to assist in erecting and putting machinery, apparatus and plant together and to receive and carry out instructions from the York Manufacturing Company in the handling of the same. The York Manufacturing Company to have entire charge of the plant during the erection of same, and when ready for operation it shall be operated in accordance with the directions given by the representatives or engineer of the York Manufacturing Company. The York Manufacturing Company, or its representatives, will furnish a written notice to purchaser of the time when the plant is ready for charging. The limit of time which the York Manufacturing Company's engineer is to remain with the plant for the purpose of instructing the purchaser's men and making needed adjustments to the machinery and apparatus or plant shall be — days from the date when the plant is ready for charging, and if detained beyond that period through no fault of the York Manufacturing Company, the purchaser shall pay for the services of his assistance, after the

expiration of said period, at the rate of $7.00 per day and all
105 expenses for each man. If the full operation of the machinery, apparatus or plant shall be postponed beyond the above mentioned period, then, at the expiration of said period, the purchaser agrees to make payment of the entire contract price, in like manner as if the machinery, apparatus or plant, had been fully operated and accepted by the purchaser. The purchaser hereby agrees to employ none but careful and competent employees, and to properly operate the machinery, apparatus or plant, to furnish needed engineers, firemen, fuel, steam, water, oil, waste, and other incidentals requisite or proper for the purpose, and shall at all times render friendly assistance, as and when requested by the York Manufacturing Company.

Labor for Erecting.

Purchaser will furnish all needed labor to erect the herein specified machinery.

Blocking and Staging.

Purchaser will furnish temporary blocking, staging and timber that may be needed in the execution and erection of the work, and remove the same when the work is completed,

Hoisting and Other Tools.

Hoisting and other tools for use in the erection of the machinery and apparatus will be furnished free of charge by the York Manufacturing Company in all cases when it agrees to furnish the labor for erecting. In all other cases the York Manufacturing Company will furnish such tools, if requested, at the rate of $2.00 per day, the purchaser to pay freight and charges both ways and to be responsible for their loss or any damage to them.

YORK MANUFACTURING COMPANY AND

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106 Agreement No. 1.

M-215-A. 12-11-3500.

Proposal and Specification.

Buildings, Carpenter Work, etc.

Purchaser will furnish and erect new buildings, or will make necessary change in present buildings, in accordance with plans to be submitted to and approved by the York Manufacturing Company. The purchaser will furnish and erect with suitable materials and in workmanlike manner, all foundation work, masonry and carpenter work required in said buildings, or in connection with the machinery, apparatus or plant herein contracted for; and will furnish and have ready in position all parts and appliances to be furnished by him under these specifications. All the foregoing to be completed and ready for the reception and installation of the herein specified

machinery, apparatus or plant, on or before 24 day of May 1912. The purchaser agrees to do all needed steam, ammonia and brine covering and to supply and connect under adequate pressure sufficient fresh water to condensers, coolers, etc., also furnish sewer drains properly laid and trapped to points where needed, and to furnish all light required for the erection and operation of the machinery, apparatus or plant, all of which is to be done in time to prevent any delay to the York Manufacturing Company in its performance of its part of this agreement; if not so done, or if the York Manufacturing Company suffer and delay by reason of the failure of the purchaser to have any other work of preparation ready as herein agreed, then the loss of time of the York Manufacturing Company's men, and all other expenses occasioned the
107 York Manufacturing Company during or by reason of such delay, shall be borne by the purchaser and paid to the York Manufacturing Company.

Guarantee of Workmanship, Construction and Material.

The York Manufacturing Company guarantees workmanship and material for one year (natural wear, tear and accident excepted), provided no disarrangement of or injury to machinery, apparatus or plant, herein contracted for, be caused by incompetency, carelessness or want of attention, or by the use of improper supplies, and further provided that the said machinery, apparatus or plant shall have been operated in a proper manner and in accordance with the York Manufacturing Company's instructions; and in case any damage be caused by any part of the machinery, apparatus or plant herein specified proving defective, the York Manufacturing Company's liability will be limited to repairing such defective part or parts or furnishing a duplicate of the same, free of charge to the purchaser.

YORK MANUFACTURING COMPANY AND

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Agreement No. 2.
Page 10.
M-216-A. 12-11-3500.

Proposal and Specification.

Responsibility for Failures and Delays.

It is hereby agreed as follows; Neither party shall be held liable for, nor suffer any forfeiture or penalty by reason of delays caused by fire, element, rebellion, riot, strikes, labor troubles, or
108 civil commotion of any kind, or by unusual delay in transportation, or by any other matters beyond the control of the parties hereto.

Patents.

The York Manufacturing Company guarantees the machinery, apparatus or plant furnished by it under this contract not to interfere with or infringe upon the patents of others, and will, at its

own expense, defend all suits instituted against the purchaser for infringement of patent rights by reason of the use by the purchaser of the machinery or apparatus furnished by the York Manufacturing Company under this contract; provided due notice of the litigation and an opportunity to defend the same be given to the York Manufacturing Company.

The York Manufacturing Company agrees, authorizes and permits the purchaser to operate such machinery and apparatus herein contracted for when placed on the premises of the purchaser, together with the several parts incidental thereto, as are secured to and controlled by the York Manufacturing Company by letters patent, free from any royalty over and above the purchase price of the machinery, apparatus or plant herein specified.

Cash Advances.

The purchaser agrees to make all cash advances for such disbursements as otherwise would have to be made by the York Manufacturing Company, in connection with the delivery, erection and installment of the plant herein specified. Any sum so advanced shall be deducted from the second payment at the time it became due.

Acceptance and Performance.

If for a period of thirty days after the machinery, apparatus or plant, furnished hereunder, is erected ready to charge, the
109 purchaser shall fail to notify the York Manufacturing Company in writing of any claim that the said machinery, apparatus or plant, as furnished, does not fulfill the terms and requirements of the contract, specifying in what particular it fails, this shall be considered an acknowledgment by the purchaser that the said machinery, apparatus or plant, as furnished, does fulfill the said terms and requirements, and shall constitute a complete acceptance of the same as fulfilling all the terms and requirements of the contract.

In case the purchaser shall notify the York Manufacturing Company in writing within thirty days after the machinery, apparatus or plant furnished hereunder, is ready for charging, that the same does not fulfill the terms and requirements of the contract, specifying in what particular or particulars it fails, then a reasonable time shall be allowed the York Manufacturing Company in which to remedy any defects or deficiencies that may be found by it to exist, in order to make it fulfill the said terms and requirements; but in such

YORK MANUFACTURING COMPANY AND

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Agreements No. 3.

Page 11.

M-217-A. 12-11-4000.

Proposal and Specification.

case the time consumed by the York Manufacturing Company in remedying such defects or deficiencies shall correspondingly post-

pone the deferred payments to be made for such machinery apparatus or plant. In any event, if the parties hereto are unable to adjust such disputed as may arise between them under this
110 contract, then the York Manufacturing Company, if it so elects, shall have the privilege of removing the said machinery, apparatus or plant at any time after (30) days' notice given to the purchaser of its intention so to do; provided that the expense of such removal shall be paid by the York Manufacturing Company, and that it shall refund or offer to refund to the purchaser all money paid to it on account of the said machinery, apparatus or plant; and in such event the purchaser hereby expressly agrees to permit the York Manufacturing Company, by, its agents, representatives and employees, to enter upon and remove from the premises in or on which the same is erected or installed, all machinery apparatus or plant furnished hereunder; and in the event aforesaid the refunding, or the tender by the York Manufacturing Company to the purchaser of all money paid to it by the Purchaser under this contract shall operate as a full and complete release and discharge of the said York Manufacturing Company from all damage or liability under this contract, and shall be a full and complete settlement between the parties of all claims thereunder.

The York Manufacturing Company reserves the right to change the construction or design of the machinery, apparatus or plant, if in its judgment such change is to the interest of all parties and does not vary the results.

Neither party shall be bound in any way by any ex parte test of any part of the machinery or apparatus made by the other party.

There is no verbal or other understanding outside of the specifications and agreement hereunto annexed as written and printed.

Machinery not specified herein will be furnished in all cases by the purchaser.

York Manufacturing Company will make shipment in
111 thirty days after approval of contract.

YORK MANUFACTURING COMPANY AND

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Agreements No. 4.

Page 12.

M-218-A. 12-11-3500.

Contract.

This agreement, made this 24 day of April 1912, by and between the York Manufacturing Company, a corporation duly incorporated under the laws of the State of Pennsylvania, having its principal office in the City of York, York County, Pennsylvania, party of the first part, and V. B. Colley and J. E. Billingsley com-partnership having its principal office in the town of Stockdale, Texas, party of the second part, Witnesseth:

The party of the first part agrees to construct for and deliver to the party of the second part on the R. R. Depot of Stockdale, Texas, with Freight allowed, the machinery, apparatus or plants mentioned and described in the specifications hereto attached, which specifications, together with the agreements and guarantees therein contained on the part of each of the parties hereto to be kept and performed, are hereby expressly made a part of this agreement. The premises of the party of the second part, in which the said machinery, apparatus or plant is to be placed, are situated in the town of Stockdale, County of Wilson state of Texas, at No. — Street.

The party of the second part agrees to pay the party of the first part for the said machinery, apparatus or plant, the sum of Two Thousand, four hundred and eighty four dollars, $2484.00, dollars as follows, to-wit Payment to be made as follows, cash on
112 shipment of machinery $621.00, cash 60 days after arrival of Machinery $621.00, Balance to be evidenced by one Note $1242.00, to be drawn for a period of six months and to bear 6% interest and to be dated and delivered at the time of second payment.

YORK MANUFACTURING COMPANY AND

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Contract No. 1.

Page 13.

M-217-A. 12-11-3500.

Contract.

The party of the first part will have the machinery, apparatus or plant ready for shipment on or about the 30 days of approval of contract, provided the purchaser shall have performed within the time limited therefor all agreements by him to be kept and performed as set forth in the attached specifications.

When and as the whole or any portion of the said machinery, apparatus or plant shall be delivered on the premises of the party of the second part, said party of the second part will immediately cause the same to be insured against loss or damage by fire in Insurance Companies to be approved by the party of the first part hereto in any amount equal to the purchase price thereof; the loss or damage under such policies to be made payable to the party of the first part as its interest may appear, and the said policies to be maintained in force by the party of the second part until the entire purchase price herein agreed to be paid, shall be actually received by the party of the first part in cash.

It is further expressly agreed that the title to and ownership of the machinery, apparatus or plant herein contracted for shall remain in the York Manufacturing Company until the entire purchase price herein agreed to be paid, and all notes and other securities given to secure the same or any part thereof, shall be actually paid in
113 cash: and in case of failure or refusal by the party of the second part to make the payments, or any of them, when due

under this contract, or to make settlement by the execution and delivery of notes or other obligations as hereinbefore agreed, or to pay any of said notes or obligations when the same shall fall due, then the whole of the unpaid portion of the purchase money, howsoever secured and whenever payable, arising under this contract, shall thereby at the option of the said party of the first part become immediately due and payable; and in case of such default, the party of the first part shall thereupon have the right if it so elects to enter upon the premises upon which such machinery, apparatus or plant is installed, and, by its agents, representatives and employees take possession of and remove the same, and the party of the second part shall afford every facility therefor; and in case said machinery, apparatus or plant shall be taken by the party of the first part under this agreement by reason of such default then the party of the second part shall pay the party of the first part all expenses incurred in installing and removing the same, and for all damages to the same arising from wear and tear and such further sum as will reasonably compensate the party of the first part for the use or rental of the said machinery, apparatus or plant, which said rental is hereby fixed and agreed to be six per cent per annum upon the total purchase price herein agreed to be paid, and to be calculated from the date when said machinery, apparatus and plant was erected ready to charge; but the foregoing provisions shall in no wise alter or impair the obligations of the party of the second part to keep said machinery, apparatus or plant in good condition while in the custody of the party of the second part,

YORK MANUFACTURING COMPANY AND

M-220-A. 12-11-3500.

114 Contract No. 2.
Page 14.

Contract.

and in case of such retaking by the party of the first part, the party of the second part shall also pay to the party of the first part all damage to such machinery, apparatus or plant which may have been caused by the negligence, carelessness or abuse thereof by the party of the second part, his representatives or employees.

All of the agreements herein set forth are hereby made binding upon and enforceable by the heirs, executors, administrators, successors and assigns of the respective parties, hereto.

This contract shall only become operative when the same shall have been approved in writing by the President or Vice President, and the Secretary or Treasurer of the York Manufacturing Company and attested by its corporate seal.

In witness whereof, the parties hereto have duly executed these presents, this 24 day of April 1912.

[Purchaser's Corporate Seal here if they have one.]

YORK MANUFACTURING COMPANY,
By C. J. BAUDERER.
V. B. COLLEY.
J. E. BILLINGSLEY.

Witnesses to Purchasers:
A. A. WILLKS.
R. J. HAND.

Approved by the York Manufacturing Company at York, Pa., this — day of ——, 191--.

[York Manufacturing Company's seal here.]

YORK MANUFACTURING COMPANY,
By —— ——, *President.*
—— ——, *Secretary.*

115 Witnesses to York Mfg. Co.:
A. A. WILLKS.
R. J. HAND.

YORK MANUFACTURING COMPANY AND —— ——.

Contract No. 3.
Page 15.

Filed 19 day of Dec. 1913.

3. *Last Amended Reply to the Answers of Defendants.*

In the District Court of Wilson County, Texas.

#1847.

YORK MANUFACTURING COMPANY
v.
V. B. COLLEY ET AL.

Now comes the plaintiff, York Manufacturing Company, and excepts to the amended answer and plea of the defendants filed herein, for that the same is insufficient in law to warrant a recovery in favor of defendants and against the plaintiffs, or to defeat the plaintiffs recovering a judgment against the defendants on the cause of action

set forth in the amended petition, and of this demands the judgment of the court.

N. C. ABBOTT,
Attorney for Plaintiff.

For reply to the allegations of the defendants' amended answer herein filed, this plaintiff shows to the court;

1. Replying to the first paragraph of said answer plaintiff admits it is a corporation of Pennsylvania, as alleged in said answer
116 and doing an interstate business, in that it is engaged in commerce among the several states; and admits that it entered into the contract set forth in its petition, and has not obtained a permit from the Secretary of State to do business, but denies that said contract was executed and entered into on the 24th. day of April A. D. 1912, or at any other time than May 29th., A. D., 1912; denies that at the date of said contract, or at any other time it was desirous of transacting business in this state, or that it had theretofore, or since said date, transacted business in this state, or that it desired to or did solicit business in this state other than in the manner and form hereinafter noted; denies that it had, or ever did establish a general or special office in this state; denies that on said date, or any other date or time, it was engaged in carrying on the business of construction and erection of ice making and refrigerating plants in the State of Texas, and alleges and says that the making of said contract, selling and manufacturing of the property therein described and the delivery thereof, and the doing of all and everything in said contract called for was in the performance of an interstate transaction, and that in so performing said contract this plaintiff was engaged in transacting or causing to be transacted in interstate commerce, all of the machinery, material and apparatus mentioned in said contract from its plant in the City of York, in the State of Pennsylvania for delivery to defendants in the town of Stockdale, in the State of Texas, and was thereby engaged in interstate commerce, and not subject to the provisions of articles 1314 and 1318 of the Revised Statutes of Texas.

2. Replying to the second paragraph of said answer, plaintiff denies that on said date, or any other date, it entered into a contract by and through its local agents and employes in the City of San Antonio, Texas, or at any other place in the State of Texas, with the defendants for the construction and erection of an ice making
117 and refrigerating plant in the town of Stockdale, denies that it ever entered into any contract with the defendants for any purpose whatever, other than the one mentioned and set forth in the petition herein filed, or at any other place, manner or date than therein mentioned, but alleges that the making of said contract, and all that was done thereunder was in the transaction of interstate, as herein before and hereinafter alleged.

3. Replying to the third paragraph of said answer, plaintiff denies that it ever entered into a contract with the defendants in the City of San Antonio, Texas, or any other place in the State of Texas for

the erection and construction of one certain ice plant in the town of Stockdale, Texas, but alleged that on the 29th day of May, A. D., 1912, it entered into the contract set forth in the petition for the sale of ice machinery to be delivered at Stockdale, Texas, and admits that the contract so made, contains the paragraph set forth in the said paragraph in said answer.

4. Replying to the fourth paragraph of said answer, plaintiff admits that the contract sued on, and mentioned in the previous paragraph hereof, contained the clause copied in said fourth paragraph of said answer.

5. Replying to the fifth paragraph of said answer, plaintiff denies all the allegations therein contained.

6. Replying to the sixth paragraph of said answer, plaintiff admits that the contract sued on, and mentioned in the third paragraph hereof, contained the clause copied in said sixth paragraph.

7. Replying to the seventh paragraph of said answer plaintiff alleges that for want of information it is unable to determine whether or not the specifications and blue prints attached to
118 said answer are correct, or were used, and therefore denies all allegations in reference thereto.

8. Replying to the eighth paragraph of said answer, plaintiff denies each and every allegation thereof.

9. Replying to the ninth paragraph of said answer, plaintiff alleges that it had a depot for supplies in Houston, Texas, and had an office there only for the care and protection thereof, and denies each allegation in said paragraph contained.

10. Replying to the tenth paragraph of said answer, plaintiff denies each allegation thereof, but alleges that the said C. J. Bauderer was a traveling salesman for plaintiff soliciting orders in Texas, Louisiana, New Mexico, and parts of Mississippi, Arkansas and Oklahoma, submitting the same to plaintiff for its approval or rejection.

11. Replying to the eleventh paragraph of said answer, plaintiff denies each and every allegation therein contained.

12. Replying to the twelfth paragraph of said answer plaintiff denies each and every allegation therein contained.

13. Plaintiff denies that at the time of the execution of said contract sued on, or at any other time, it was engaged in transacting or doing business in the State of Texas; or established a general or special office in this State, or doing or performing any other transaction in violation of the provisions of the statutes above mentioned.

14. Plaintiff admits that as per the term of its contract set forth in petition it furnished to defendant one erecting engineer for the purpose superintending the erection or assembly of the machinery described in the petition and furnished by plaintiff and alleges that defendants agreed to pay for the said engineer the sum of six dollars per day for the services rendered, but denies that it furnished any labor whatever, or any material, or machinery, except what
119 is described in said contract and that all of the material or machinery so furnished was manufactured or obtained for the defendants, in the State of Pennsylvania by the plaintiff, and shipped

or transported in interstate commerce for delivery to the defendants in the State of Texas, and denies that it ever had any possession or control of the erection of said plant, other than to furnish the defendants the said engineer in accordance with the terms and conditions of said contract; and plaintiff denies that the defendants, at the special instance and request of the plaintiff, paid or advanced any money to the employes of the plaintiff, or that plaintiff had any employes there, during the building and erection of said machinery, or at any other time, or for that or any other purpose.

15. Plaintiff further says that the only purpose of furnishing said engineer was to insure the proper putting together of the machinery so manufactured, and transported in interstate commerce, as aforesaid and to insure the proper working thereof; all to the benefit of the defendants, and the price the defendants was to pay therefor was a part of the purchase price of said machinery and the delivery thereof to the defendants by putting the same in proper order.

16. Plaintiff denies that at the time of the execution of the contract sued on, or at any other time, C. J. Bauderer was the special agent and representative of the plaintiff, and denies that he ever exercised, or had, any authority or right to represent plaintiff in any business of selling, but alleges that he did solicit of the defendants the business set forth and described in said contract sued on, and after so soliciting the same presented the proposition to plaintiff at its office in York, Pennsylvania for its approval or rejection, and further alleges that such solicitation, and submission to plaintiff was all that he did in the transaction, and all that he had the right or authority to do.

17. Plaintiff further denies the allegations of the 12th paragraph of said answers, and denies that the plaintiff had any possession of said plant or of any property described in said contract after the shipment thereof to defendants in accordance with said contract, or anything to do therewith, other than was necessary to superintend the erection of the machinery in accordance with the terms of the contract.

120

18. Plaintiff denies each and every allegation in said answer contained, not hereinbefore specifically admitted.

19. For a further reply to said answer plaintiff represents to the court that it is a corporation of the State of Pennsylvania, organized for pecuniary profit, and authorized and doing an interstate business, and in the carrying out of said purpose and authority, it entered into the said contract in the State of Pennsylvania, and alleges that the making of said contract, and performing and complying with the terms thereof was in the conduct of an interstate transaction and that all of said machinery and material mentioned in said contract was manufactured and procured by the plaintiff for the defendants at the plant of the plaintiff at York, State of Pennsylvania and was transported or shipped by the plaintiff to the defendants by common carrier engaged in interstate commerce for delivery to the defendants in the town of Stockdale, in the State of Texas, and that all of said machinery and material was the subject matter of interstate commerce transaction, and plaintiff claims immunity from the terms and

conditions of any statute of the State of Texas imposing burdens or restrictions on its right to do an interstate business in legitimate articles of commerce; and plaintiff alleges that if there is any statute, or construction thereof which interferes with the purpose and right aforesaid, the same is in violation of Article One (1), Section Eight (8), clause Three (3) of the Constitution of the United States authorizing Congress to regulate commerce with foreign nations, and among the several states, and for that reason is void.

20. For a further reply to said answer the plaintiff repre-
121 sents to the Court that as such corporation it is authorized among other things, to engage in the buisness of manufacturing and selling refrigerating machinery, material, apparatus and supplies, and that it maintains its manufacturing plant in the City of York, State of Pennsylvania; that the contract sued on in this case was made by and between the plaintiff and the defendants in the City of York, in the State of Pennsylvania; that in and by said contract plaintiff agreed to manufacture for the defendants and deliver to them at the Town of Stockdale, in the State of Texas, all of the machinery, material and apparatus mentioned in said contract, and that in the performance of said contract it manufactured and furnished all of said machinery, material and apparatus at its said plant in the State of Pennsylvania, and shipped or caused to be shipped by common carrier, from its said manufacturing plant in the State of Pennsylvania to the defendants in Stockdale, in the State of Texas, and there to be delivered to the defendants as provided in said contract. And alleges that the making of said contract by this plaintiff, and the performance and compliance with the terms thereof by it as aforesaid, was in the conduct of an interstate transaction and constituted Interstate commerce, and was free from any restrictions or impositions, and any regulations by the State of Texas, and was, and is, not subject to the terms and provisions of any statute of the State of Texas imposing burdens, restrictions or impositions thereon, or on the right or privilege of this plaintiff to do an interstate business in interstate commerce in legitimate articles of commerce, and that the same was, and is, not subject to the provisions of Articles 1314 and 1318 of the Revised Statutes of Texas. And plaintiff further alleges that if there is any statute imposing burdens restrictions, or impositions thereon, or on the right or privilege of this plaintiff to do an interstate business in interstate commerce, in the legitimate articles of commerce aforesaid, or if any statute of the State
122 of Texas shall be so construed as to interfere with the purpose, rights and privileges of this plaintiff in said transaction as aforesaid the same is in violation of Article One (1), Section Eight (8), Clause Three (3) of the Constitution of the United States, wherein it is provided that "Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes".

21. For a further reply to said answer, plaintiff represents to the Court that it claims the right of privilege to comply with the terms of said contract free from any restrictions or impositions or any regu-

lations or burdens imposed thereon by the statutes of the State of Texas, which right or privilege is claimed under the Constitution of the United States as aforesaid, and plaintiff claims immunity from the terms and provisions of any statute of the State of Texas imposing burdens and restrictions on its rights to do an interstate business in interstate commerce in the making and performance of said contract.

22. For the further replying to said answer the plaintiff represents to the court that the statutes of the State of Texas, being Chapter 17, Title 21 of the 1897 Revised Statutes of Texas, entitled Foreign Corporations, and particularly Articles 745 and 746 thereof; also known as Chapter 26, Title 25 Vernon's McIlwaine's Texas Laws Annotated 1912, entitled Foreign Corporations, and particularly Articles 1314 and 1318 thereof, also known as Chapter 26, Title 25, McEachin's Texas Civil Statutes Annotated, entitled Foreign Corporations, particularly Articles 1314 and 1318 thereof, are unconstitutional and invalid on the ground of their being repugnant to the provisions aforesaid of the Constitution of the United States.

Wherefore, plaintiff prays that it may have judgment against the defendants as demanded by the petition.

N. C. ABBOTT,
Attorney for Plaintiff.

123 STATE OF TEXAS,
County of Harris:

N. C. Abbott being duly sworn on oath says that he is attorney for the plaintiff in the above numbered and entitled cause; that he knows the facts set forth in the above reply, and that the same are true as he verily believes, except as to those facts alleged on information, and as to those he believes they are true.

N. C. ABBOTT.

Subscribed and sworn to before me this 17th day of December, 1913.

[L. S.] A. McCOINSKY,
Notary Public, Harris County, Texas.

4. *The Minutes of the Judge, or Journal Entry Showing the Dismissal as to the Defendant Mrs. M. R. Colley.*

Number 1847.

YORK MANUFACTURING COMPANY
vs.
V. B. COLLEY et al.

On this the 12th day of May, 1914, came on for trial the above styled and numbered cause, and the plaintiff, York Manufacturing Company, appeared by counsel, and moved the court to dismiss its cause of action as to defendant, Medora R. Colley, without prejudice,

which upon consideration of the court was granted, and said defendant, Medora R. Colley, dismissed from this cause.

Whereupon the plaintiff announced ready upon the issues raised by the defendants' Plea in Abatement, and likewise the defendants, V. B. Colley and J. E. Billingsley announced ready for trial only upon the issues presented by their plea in abatement,
124 & 125 whereupon a jury being waived upon said issue, the same was tried by the court, who after hearing the pleadings read, evidence and argument of counsel, is of the opinion the law and facts are for the defendants upon all the issues raised in said plea, and that plaintiff cannot maintain said suit, and it is ordered, adjudged and decceed by the court that said suit be and the same is, hereby dismissed from the docket of this court, and that defendant go hence without day, and recover of the plaintiff all costs in this behalf expended.

O. K.

F. G. CHAMBLISS, *Judge.*

* * * * * * *

126 7. *Amended Motion for New Trial.*

In the District Court of Wilson County, Texas.

Filed 29 day of May, 1914.

#1847.

YORK MANUFACTURING COMPANY
v.
V. B. COLLEY et al.

Now comes the plaintiff, York Manufacturing Company, by leave of court first had and obtained, and files this its amended motion for new trial, and moves the court for an order setting aside the judgment herein and granting it a new trial in the above entitled and numbered cause, for the following reasons:

First.

The court erred in finding on the evidence produced that the plaintiff, at the time of making the contract sued on, was doing business in the State of Texas, within the meaning of the statutes thereof.

127 Second.

The court erred in finding that the plaintiff maintained an office within the State of Texas in violation of the statutes thereof.

Third.

Because the finding of the court is not sustained by the pleadings and evidence in the case.

Fourth.

The court erred in finding and rendering judgment for the defendants on the pleadings and evidence in the case.

Fifth.

The court erred in finding under the evidence that Articles 1314 and 1318 of the Statutes of the State of Texas had any application to the business of the plaintiff as set forth in its petition, under the contract sued on, and the evidence in the case.

Sixth.

Under the pleadings, evidence and law of the case the finding and judgment of the court should have been for the plaintiff and against the defendants.

Seventh.

The court erred in finding and holding that any acts of the superintending engineer done and performed outside of the terms of the contract sued on, had any binding effect on the plaintiff.

Eighth.

Because the contract sued on and the consummation thereof, as shown by the pleadings and evidence, constitute a transaction in interstate commerce, and the plaintiff was not amenable to the provisions of Articles 1314 and 1318 of the statutes of Texas.

128 Ninth.

In so far as said Articles 1314 and 1318 of the statutes of Texas affect the rights of plaintiff in doing an interstate business, as shown by the pleadings and evidence to have been conducted in this case, the provisions thereof are in violation of Article One, Section Eight, Clause Three of the Constitution of the United States, granting to Congress the right to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes, and are void.

Tenth.

The court erred in admitting the evidence of Defendants, V. B. Colley and J. E. Billingsley, to the effect that the engineer did and performed things not called for in the contract to the admission of which the plaintiff at the time objected and excepted.

Eleventh.

The court erred in admitting in evidence over the objection of plaintiff, letters purporting to have been written by C. J. Bauderer to the defendants.

Twelfth.

The court erred in admitting in evidence over the objection of plaintiff, letters purporting to have been written by W. E. Becker and H. B. Swetland to the defendants.

N. C. ABBOTT,
Att'y for Plaintiff.

8. *Ruling of the Court Overruling the Motion for New Trial.*

No. 1847.

YORK MANUFACTURING COMPANY,
vs.
V. B. COLLEY et al.

May 29, 1914, motion for new trial overruled to which Pl'ff excepts and in open court gives notice of appeal to the Court of
129 Civil Appeals of the 4th Supreme Judicial District of Texas.

* * * * * * *

130 10. *Assignments of Error.*

In the District Court of Wilson County, Texas.

#1847.

YORK MANUFACTURING COMPANY
v.
V. B. COOLEY et al.

Assignments of Error.

Now comes the plaintiff, York Manufacturing Company, and files this its assignments of error, and represents to the court that there was error in the proceedings and record in the above styled and numbered cause in this to-wit:

First.

The trial court erred in finding on the evidence produced that the plaintiff, at the time of making the contract sued on,
131 was doing business in the State of Texas, within the meaning of the statutes thereof.

Second.

The said court erred in finding that the plaintiff maintained an office within the State of Texas in violation of the Statutes thereof.

Third.

Because the judgment and finding of the court is not sustained by the pleadings and evidence in the case.

Fourth.

The court erred in finding and rendering judgment for the defendants on the pleadings and evidence in the case.

Fifth.

The said court erred in finding under the evidence that Articles 1314 and 1318 of the Revised Civil Statutes of the State of Texas had any application to the business of the plaintiff as set forth in the petition, under the contract sued on, and the evidence in the case.

Sixth.

Under the pleadings, evidence and law of the case the finding and judgment of the court should have been for the plaintiff and against the defendants.

Seventh.

The said court erred in finding and holding that any acts of the superintending engineer done and performed outside of the terms of the contract sued on, had any binding effects on the plaintiff.

132 Eighth.

Because the contract sued on and the confirmation thereof as shown by the pleadings and evidence, constitute a transaction in interstate commerce, and the plaintiff was not amenable to the provisions of said Articles 1314 and 1318 of the said statutes of Texas.

Ninth.

In so far as said Articles 1314 and 1318 of the said Statutes of Texas affect the rights of plaintiff in doing an interstate transaction, as shown by the pleadings and evidence to have been conducted in this case, the provisions thereof are in violation of Article One, Section Eight, Clause Three of the Constitution of the United States, granting to Congress the right to regulate commerce with foreign nations, among the several states, and with Indian Tribes, and are void.

Tenth.

The said Court erred in admitting in evidence over the objection of the plaintiff letters purporting to have been written by C. J. Bauderer to the defendants.

Eleventh.

The court erred in admitting in evidence over the objection of plaintiff, letters purporting to have been written by W. E. Becker and H. B. Swetland to the defendants.

Twelfth.

The court erred in his second conclusion of fact in finding that plaintiff maintained a special or branch office in the State of Texas, from the year 1901 to 1912, and so maintained same when plaintiff contracted to erect the ice plaint of defendants, and that it had its agents in Texas and warehouses, in which it kept material for
133 carrying on its business, and sold and delivered same to customers in different portions of the State.

Thirteenth.

The court erred in holding in said conclusion of fact that the plaintiff contracted to erect the ice plant for defendants.

Fourteenth.

The court erred in his third conclusion of fact in finding that the plaintiff furnished the material and part of the labor to erect and that it did erect and construct the ice plant in the town of Stockdale for the defendants.

Fifteenth.

The court erred in finding in said conclusion of fact that the plant was to be erected and constructed for a lump sum of money, and that plaintiff had the exclusive possession and control of said plant and the erection thereof, which said construction consumed from 25 to 30 days' time to complete.

Sixteenth.

The court erred in his fifth conclusion of fact that some of the plans used in the construction of the ice plant were made in Texas.

Seventeenth.

The court erred in his first conclusion of law that the furnishing of said material, labor and the construction of said ice plant for a lump sum of money was not interstate commerce.

Eighteenth.

The court erred in his second conclusion of law that the making of said contract, the furnishing of material, the labor
134–154 performed in the construction of said ice plant, together with the exclusive possession and control of said con-

struction by the plaintiff, was transacting business in this state and in violation of law.

Nineteenth.

The court erred in his third conclusion of law that the establishing of said special or branch office in the State of Texas, and having agents thereof, was in violation of law.

Twentieth.

The said court erred in overruling the motion of plaintiff for a new trial.

N. C. ABBOTT,
Att'y for Plaintiff.

* * * * * * *

155 13. *Conclusions of Fact and Law Filed by the Judge.*

Filed 28 Day of May, 1914.

Suit Pending in the District Court, Wilson County, Texas, May Term, A. D. 1914.

#1847.

YORK MANUFACTURING CO.
vs.
V. B. COLLEY et al.

Conclusions of law and facts as found by the Court, upon the request of plaintiff, based on the issues raised on the hearing of the defendants' plea in abatement.

Conclusions of Facts.

1st. It is admitted by the plaintiff that it is a corporation, organized for pecuniary profit, under the laws of the State of Pennsylvania, and that at the time of making the contract with the defendants, sued upon in this cause, it had not filed with the secretary of State, of the State of Texas, a duly certified copy of its Articles of Incorporation and that it had no permit to transact business as a foreign corporation in this State, as provided by Articles 1314 and 1318 of the revised Civil Statutes of Texas, and that it has not now, nor has it ever had such permit to do business in Texas.

2nd. I find, as a matter of fact, that said plaintiff maintained a special or branch office in the State of Texas from the year 1901 to 1912, and so maintained same when plff. contracted to
156 erect the ice plant with defendants, and that it had its agent in Texas and warehouses, in which it kept material for carrying on its business, and sold and delivered same to customers in different portions of the State.

3rd. I find, as a matter of fact, that the plaintiff furnished the material and part of the labor to erect and that it did erect and construct the ice plant in the town of Stockdale for the defendants, which is the ice plant for which this plaintiff is suing the defendants for the purchase money and to foreclose a lien thereon; and I find that said plant was to be erected and constructed for a lump sum of money and that plaintiff had the exclusive possession and control of said plant and the erection thereof, which said construction consumed from 25 to 30 days' time to complete.

4th. I find that plaintiff through its servants and employees drew the plans for the construction of said plant and that it was constructed by their employees according to said plans.

5th. I find that some of the plans used in constructing Ice Plant were made in Texas.

Conclusions of Law.

1st. I find, that as a matter of law, that the furnishing of said material, labor and the construction of said ice plant for a lump sum of money was not interstate commerce.

2nd. I find, by the making of said contract, the furnishing of material, the labor performed in the construction of said ice plant, together with the exclusive possession and control of said construction by the plaintiff, the York Manufacturing Company, was transacting business in this State and in violation of law.

3rd. I find by the establishing of said special or branch office in the State of Texas, and having agents in charge thereof, same was in violation of law.

157 –159 4th. Therefore, by reason of the foregoing, I find that plaintiff can not maintain action.

This the 28th day of May, A. D. 1914.

F. G. CHAMBLISS,
Judge of the 36th Judicial District of Texas.

* * * * * * *

Opinion.

160 Filed Dec. 23, 1914.

No. 5363.

YORK MANUFACTURING COMPANY, Appellant,
vs.
V. B. COLLEY et al., Appellees.

Appeal From Dist. Court of Wilson County.

Appellant sued appellees, V. B. Colley and J. E. Billingsley, for a balance due upon a certain written contract and to foreclose a lien upon certain ice manufacturing machinery. The defense was made

that appellant was a foreign corporation organized for pecuniary profit; that it maintained an office and was doing business in Texas, and had not obtained a permit therefor, and for such reasons was not authorized to maintain a suit on said contract in any of the courts of the state. By supplemental petition appellant admitted that it was a foreign corporation without a permit to do business in Texas, but denied that it maintained an office or was doing business in the state within the meaning of the statute, or that its act in making the contract sued on, or the performance of the provisions thereof, was doing business in Texas, and alleged that the making of the contract and doing what was called for therein and actually done, was in strict performance of an interstate transaction. The trial court found that the acts of appellant were in violation of the statutes of the state and that it was, therefore, not entitled to maintain the suit, and entered judgment dismissing the case. Findings of fact and conclusions of law were filed, as follows:

Conclusions of Fact.

1st. It is admitted by the plaintiff that it is a corporation, organized for pecuniary profit, under the laws of the State of Pennsylvania, and that at the time of making the contract with the defendants, sued upon in this cause, it had not filed with the Secretary of State, or the State of Texas, a duly certified copy of its Articles of Incorporation and that it had no permit to transact business as a foreign corporation in this State, as provided by Article 1314 and 1318 of the Revised Civil Statutes of Texas, and that it has
161 not now, nor has it ever had such permit to do business in Texas.

2nd. I find, as a matter of fact, that said plaintiff maintained a special or branch office in the State of Texas from the year 1901 to 1912, and so maintained same when plaintiff contracted to erect the ice plant with defendants, and that it had its agent in Texas and warehouses, in which it kept material for carrying on its business, and sold and delivered same to customers in different portions of the State.

3rd. I find, as a matter of fact, that the plaintiff furnished the material and part of the labor to erect and that it did erect and construct the ice plant in the town of Stockdale for the defendants, which is the ice plant for which this plaintiff is suing the defendants for the purchase money and to foreclose a lien thereon; and I find that said plant was to be erected and constructed for a lump sum of money and that plaintiff had the exclusive possession and control of said plant and the erection thereof, which said construction consumed from 25 to 30 days' time to complete.

4th. I find that plaintiff through its servants and employees drew the plans for the construction of said plant and that it was constructed by their employees according to said plans.

5th. I find that some of the plans used in constructing the Ice Plant were made in Texas.

Conclusions of Law.

1st. I find, that as a matter of law, that the furnishing of said material, labor and the construction of said ice plant for a lump sum of money was not interstate commerce.

2nd. I find, by the making of said contract, the furnishing of material, the labor performed in the construction of said ice plant, together with the exclusive possession and control of said construction by the plaintiff, the York Manufacturing Company, was transacting business in this State and in violation of law.

162 3rd. I find by the establishing of said special or branch office in the State of Texas, and having agents in charge thereof, same was in violation of law.

4th. Therefore, by reason of the foregoing, I find that plaintiff can not maintain action."

Appellant's 1st and 2nd assignments of error read as follows:

"1. The trial court erred in finding on the evidence produced that the plaintiff, at the time of making the contract sued on, was doing business in the State of Texas, within the meaning of the statutes thereof."

"2. The court erred in his second conclusion of law that the making of said contract, the furnishing of material, the labor performed in the construction of said ice plant, together with the exclusive possession and control of said construction by the plaintiff, was transacting business in the state and in violation of law."

Under these assignments appellant contends that the making of the contract sued upon and its performance constituted the transaction of interstate commerce.

We will set out the most important portions of the contract, and make a brief statement of the most important facts proven. As a part of the "proposal and specifications" attached to the contract, we find the following provisions:

"The York Manufacturing Company to furnish one erecting engineer at $6.00 per day and expenses to superintend the erection of the machinery, apparatus or plant furnished by it; the purchaser to furnish one engineer to assist in erecting and putting machinery, apparatus and plant together and to receive and carry out instructions from the York Manufacturing Company in the handling of the same. The York Manufacturing Company to have entire charge of the plant during the erection of same, and when ready for operation it shall be operated in accordance with the directions given by the representatives or engineer of the York Manufacturing Company or its representatives, will furnish a written notice to pur-

163 chaser of the time when the plant is ready for charging. The limit of time which the York Manufacturing Company's engineer is to remain with the plant for the purpose of instructing the purchaser's men and making needed adjustments to the machinery and apparatus or plant shall be — days from the date when the plant is ready for charging, and if detained beyond that period through no fault of the York Manufacturing Company, the pur-

chaser shall pay for his services and the services of his assistants, after the expiration of said period, at the rate of $7.00 per day and all expenses for each man."

"The York Manufacturing Company reserves the right to change the construction or design of the machinery, apparatus or plant, if in its judgment such change is to the interest of all parties and does not vary the results."

The contract, to which the "proposal and specifications" are attached, contains the following clause:

"The party of the first part agrees to construct for and deliver to the party of the second part on the R. R. Depot of Stockdale, Texas, with freight allowed, the machinery, apparatus or plant mentioned and described in the specifications hereto attached, which specifications, together with the agreements and guarantees therein contained on the part of each of the parties hereto be kept and performed, are hereby expressly made a part of this agreement. The premises of the party of the second part, in which the said machinery, apparatus or plant is to be placed, are situated in the town of Stockdale, county of Wilson, state of Texas."

The contract also provides that title to the property is reserved by appellant until all purchase money is paid, and that upon default appellant shall have the right to take and remove the same in which event appellees shall pay appellant "all expenses incurred in installing and removing same." This contract was signed in Texas, in behalf of appellant, by C. J. Bauderer, its agent, on April 24, 1912, but provided that it should not become operative until approved in writing by the officers of the company under its corporate seal. Such approval was endorsed thereon at appel-
164 lant's home office at York, Pa. on May 28, 1912. All machinery and material furnished under this contract was shipped from outside the state of Texas. Appellant sent Mr. Campbell, the erecting engineer, pursuant to the contract, and he began the work of installing the machinery on July 13th., 1912, and surrendered possession thereof to appellees on Aug. 9, 1912. Appellant, in accordance with the provisions of the contract, charged $144.00 for Campbell's service as well as $23.70 for his expenses. Campbell did most of the work incident to the erection and installation of the machinery. He had charge of the plant while it was being erected, and declined to deliver possession thereof until appellees signed an acceptance of the same. The acceptance was signed after the plant had been erected and in operation for about a week. Campbell had been operating it. He told appellees that he was not allowed to leave a job until he got his papers for it, meaning a written acceptance. Campbell made one change in erecting the plant, stating: "I am instructed to comply with the requests as long as I can, but if there is any kick, to put it according to the blue prints." Appellee Billingsley, speaking of Campbell, testified: "It was necessary for us to have somebody to do the work he did; but it wasn't necessary for the York people. I told Bauderer, 'I can hire an engineer for three dollars a day and cut out that six', and he said: 'You had better let him come on; they erect them plants and

know how.'" There was evidence to the effect that Campbell was authorized in all cases to request the purchasers to give a written acceptance in order to show their satisfaction. There was also evidence to the effect that he was not authorized from appellant's main office to do anything in connection with the contract except as provided therein, and was not authorized to assume control over the machinery after it was installed. However, the record discloses that Campbell was under the direction of F. W. Pilsbury, who was in charge of appellant's Chicago office, and there is no testimony to show what authority or instructions he was given by Pilsbury. Appellant furnished from its home office about ten blue prints and drawings showing how the various portions of the machinery
165 were to be erected and installed; also a blue print made by Bauderer in Texas showing the floor plan and side elevation of the building in which the machinery was to be placed. Appellant maintained a branch office at Houston, Texas, from Aug. 1, 1901 until Aug. 16, 1912. It carried no stock at such office, but had a depot in Houston at which it carried, at that time, a stock of fittings amounting to about $5,562.00. Since the last named date its stock has been carried on consignment with two Texas corporations. About July 18, 1912 appellant supplied appellees from its stock at Houston with goods of the value of $5.22, but such goods were not furnished under the contract sued upon. Prior to making the contract sued upon, appellant had erected fourteen ice plants in Texas.

The evidence sustains a finding to the effect that appellant, at the time it made the contract sued upon, was engaged in the transaction of business in Texas and maintained an office in Texas within the meaning of Article 1314 of Revised Statutes of 1911. Cheney Bros. vs. Commonwealth, 106 N. E. 316; Baltic Mining Co. vs. Massachusetts, 231 U. S. 68, 58 L. ed. 127. But it appears that if the execution of the particular contract sued upon and its performance constituted interstate commerce, then appellant is entitled to sue upon such contract regardless of the violation of the statute in respect to other transactions or by maintaining an office within the state. T. & P. Co. vs. Davis, 54 S. W. 381. Same case in Supreme Court, 93 Tex. 378. It, therefore, becomes necessary to decide whether the contract sued upon involves only an interstate commerce transaction.

Appellant contends that it did not agree to install and did not in fact install the machinery, but merely furnished an engineer to superintend the installation by appellees of the machinery. But we think it is evident from a reading of the contract that appellant retained the possession of the property until it should be installed, and virtually bound itself to deliver a finished plant with the exception that appellee should furnish the labor necessary to
166 carry out the engineer's instructions. The contract was one to install machinery provided appellees furnish labor to assist appellant's engineer, and the fact that all the work was not done by appellant's engineer does not alter the fact that the contract was for the delivery of a completed plant to be installed in this state. Appellant furnished the services of its engineer to be performed in

is state, contracting in a manner making it compulsory upon ppellees to accept and pay for such services. The evidence dis-oses the construction placed upon the contract by appellant's en-neer, and there is no testimony to the effect that he in any way olated the instructions or exceeded the authority given him by lsbry. There are a number of cases in which it has been held that ntracts for the sale of machinery in one state to be installed in nother by the seller are protected by the Commerce Clause of the ederal Constitution. See Flint & Walling Mfg. Co. vs. McDonald, 4 N. W. 684, 14 L. R. A. (N. S.) 673; Milan Mill vs. Garten, 93 nn. 590, 27 S. W. 971, 26 L. R. A. 135; Gates Iron Works vs. hen, 43 Pac. 667. But our Supreme Court, in the case of Smythe . vs. Ft. Worth Glass & Sand Co., 142 S. W. 1157, declined to press an opinion upon the question. This court, in the case of schen & Sons Rope Co. vs. Moser, 159 S. W. 1018, held that an reement to furnish a supervising engineer at a certain price, pro-ded the purchasers wanted him, would not alter the character of e transaction. It appeared to us that the erection of the tramway as such an exceptional, as well as gigantic and complicated enter-ise that purchasers might well decline to buy unless an engineer miliar with such work was furnished to superintend the erection ereof. In addition the facts showed an immediate delivery of all aterial and no requirement that the purchasers should accept and y for the services of the engineer. With the light before us at that ne we felt confident our decision was correct. The trend of prac-ally all the decisions appeared to be toward holding that any tempt to tax or prohibit without a permit the installation by a non sident corporation of machinery sold and shipped from without e state was an attempt to regulate interstate commerce and not permissible. Since rendering that decision, we have had occa-7 sion, in this case and in other cases, to investigate the ques-tion further, and have come to the conclusion that our state-ent of what we regarded to be the law was broader than was re-ired by the facts of that case, and broader than is justified by the cisions of the United States Supreme Court. In the case of Brown-g vs. City of Wacross, decided by the Supreme Court of the United ates on April 6, 1914, and reported in U. S. Adv. Op. 1913, p. 578, was held that an agent for a foreign corporation who solicited ders for the sale of lightning rods in another state, received the ds and erected them for such corporation, the price paid for the ds to the corporation including the duty to erect them without rther charge, may be subjected to a municipal tax without violat-g the commerce clause of the Federal Constitution. The court scussed the cases of Caldwell vs. North Carolina, 187 U. S. 622, 47 ed. 336; Rearick vs. Pennsylvania, 203 U. S. 507 and Dozier vs. abama, 218 U. S. 124, 54 L. ed. 965, saying in part: "It is evident at these cases when rightly considered, instead of sustaining, serve refute, the claim of protection under the interstate commerce use which is here relied upon, since the cases were concerned only th merchandise which had moved in interstate commerce, and ere the transactions which it was asserted amounted to the doing

of local business consisted only of acts concerning interstate commerce goods, dissociated from any attempt to connect them with or make them a part in the state of property which had not and could not have been the subject of interstate commerce. Thus, in Caldwell v. North Carolina, the court laid emphasis upon the fact that the shipment of the pictures in interstate commerce in one package and the frames in another was not essential but accidental, for the two could have been united at the point of shipment before interstate commerce began as well as be brought together after delivery at the point of destination. And this was also the condition in the Rearick Case. Indeed, it is apparent in all three cases that there was not the slightest purpose to enlarge the scope of interstate commerce so as to cause it to embrace acts and transactions theretofore confessedly local, but simply to prevent the recognized local limitations from being used to put the conceded interstate commerce power in a straight jacket so as to destroy the possibilities of its being
168 adapted to meet changes in the form by which business of an inherently interstate commerce character could be carried on."

The court gave its reasons for the holding above announced in the following language: "We are of the opinion that the court below was right in holding that the business of erecting lightning rods under the circumstances disclosed was within the regulating power of the state, and not the subject of interstate commerce, for the following reasons: (*a*) Because the affixing of lightning rods to houses was the carrying on of a business of a strictly local character, peculiarly within the exclusive control of state authority. (*b*) Because, besides, such business was wholly separate from interstate commerce, involved no question of the delivery of property shipped in interstate commerce, or of the right to complete an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated. It is true that it was shown that the contract under which the rods were shipped bound the seller, at his own expense, to attach the rods to the houses of the persons who ordered rods, but it was not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business, protected by the commerce clause. It is manifest that if the right here asserted were recognized, or the power to accomplish by contract what is here claimed were to be upheld, all lines of demarcation between national and state authority would become obliterated, since it would necessarily follow that every kind or form of material shipped from one state to the other, and intended to be used after delivery in the construction of buildings or in the making of improvements in any form, would or could be made interstate commerce."

This case being the latest expression of the Supreme Court of the United States which has come to our notice, we shall attempt to apply the rules therein enunciated to the facts of this case. Such facts, we think, show clearly that appellant contracted to engage in and
169 did engage in the strictly local business of installing an ice manufacturing plant, but were it conceded that it merely con-

tracted to engage in and did engage in the business of supervising and superintending the erection of an ice plant, such business was a strictly local business. In either event the contract calls for the transaction of business in this state without having obtained a permit. Appellant bound itself to connect, or superintend the connection of the machinery with property in this state which had not been the subject of interstate commerce. Does the state have to permit such local business to be conducted without a permit because the material to be erected into a finished plant and then delivered to the buyer was ordered from the foreign corporation and shipped from its domicile in another state? The court in the Browning case above quoted from declined to express an opinion concerning "how far interstate commerce might be held to continue to apply to an article shipped from one state to another, after delivery and up to and including the time when the article was put together or made operative in the place of destination in a case where, because of some intrinsic and peculiar quality or inherent complexity of the article, the making of such agreement was essential to the accomplishment of the interstate transaction." This language suggests that the court may recognize exceptions in cases in which the facts show agreements to supervise the erection or to erect machinery of such a complex character that the sale thereof is impossible unless such agreement is made. But if such exceptions are recognized by that high court, and must, therefore, be permitted by the state courts, the facts creating same ought to be alleged and proven. When a foreign corporation is not content with the privilege of having its agents come into this state and take orders for its goods, ship same to our citizens, and collect therefor in our courts, but contends that it has the further right to transact the business of installing machinery sold by it so as to connect it with, and make it a part of, the property in this state which was not the subject of interstate commerce, the burden certainly rests upon it of showing that, if it be prohibited from transacting such local business, such prohibition will, on account of the complex character of its machinery, affect the sale thereof to such an extent as to be
170 a restriction or regulation of its right to sell such machinery.

In this case appellant has not plead or proved that the contract to install or to furnish an engineer was necessary to enable it to make the sale to appellees. A contract relating solely to interstate commerce can be sued upon in our state courts, but as this one related partially to a strictly local business not shown to be essential to the conducting of the interstate business, the rule announced in the case of Railway v. Davis, supra, does not apply, and appellant has no right to maintain this suit in our courts.

We, therefore, affirm the judgment of the trial court.

A. N. MOURSUND,
Associate Justice.

Opinion delivered and filed Dec. 23, 1914.

Endorsed: No. 5363. In Court of Civil Appeals, Fourth Supreme Judicial District of Texas, San Antonio. York Manufacturing Company, Appellant, vs. V. B. Colley et al., Appellees. From Wilson

County. Opinion by A. N. Moursund, Associate Justice. Affirmed. Filed in the Court of Civil Appeals at San Antonio, Texas, Dec. 23, 1914. Jos. Murray, Clerk.

171 *Judgment of the Court of Civil Appeals.*

WEDNESDAY, December 23, A. D., 1914.

No. 5363.

YORK MANUFACTURING COMPANY, Appellant,
vs.
V. B. COLLEY et al., Appellees.

Appeal from District Court, Wilson County.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellees, V. B. Colley and J. E. Billingsley, do have and recover of and from the appellant, York Manufacturing Company, and its surety, Maryland Casualty Company, the amount adjudged by the Court below, and all costs in this behalf expended and incurred, and this decision be certified below for observance.

172 *Motion for Rehearing.*

Filed Jan'y 5, 1915.

In the Court of Civil Appeals for the Fourth Supreme Judicial District, at San Antonio.

#5363.

YORK MANUFACTURING COMPANY, Appellant,
vs.
V. B. COLLEY et al., Appellee.

Motion for Rehearing.

Now comes the appellant, York Manufacturing Company, in the above styled and numbered cause, and moves the Court to set aside the judgment heretofore rendered in this cause affirming the judgment of the court below, and to grant a rehearing, and reverse and render the judgment of the court below for the following reasons, to-wit:

First. Because the court erred in holding and finding that the appellant retained the possession of the property until it should be installed.

Statement.

The contract does not call for retaining possession or other control over the property, other than to superintend the erection of the particular machinery furnished.

Second. The court erred in holding and finding that the appellant bound itself to deliver a finished plant with the exception that the appellees should furnish labor necessary to carry out the engineer's instructions.

Statement.

The contract calls for the sale of specific machinery, and not an ice plant, and the superintendence only related to the machinery furnished.

173 Third. The court erred in holding and finding that under the terms of the contract appellees were compelled to accept the services of the engineer.

Fourth. The court erred in holding and finding that the appellant contracted to engage in and did engage in the strictly local business of installing an ice machinery plant.

Statement.

The contract shows it furnished specific machinery to be put in such a plant, and the evidence clearly shows it was only part of the plant.

Fifth. The court erred in holding and finding that furnishing of an erecting engineer to superintend the erection of the machinery furnished by appellant, was strictly local business.

Sixth. The court erred in holding and finding that the appellant contracted to or did furnish an erecting engineer to superintend the erection of an ice plant, for the contract called only for an erecting engineer to superintend the erection of the machinery furnished by it.

Seventh. The court erred in holding that the appellant bound itself to connect, or superintend the connection of the machinery with property in this state which had not been a subject of interstate commerce.

Statement.

The machinery sold, and for a part of the purchase price of which this suit was brought, did not constitute an ice plant, but only certain distinct machinery, as is distinctly shown by the evidence, and the contract does not call for any connection, but only to superintend the erection of the machinery furnished.

Eighth. The court erred in holding and finding that the burden of proof rests with the appellant to show that it had not violated the statute of the state, or to allege or prove it is within any sup-

174 posed exception, when that exception is not named in the statute.

Argument.

This case should be heard and determined on the terms of the contract, and from that if it appears that no engagement was made which was strictly in violation of the statute, the right to maintain a suit on the contract should be granted.

We have under consideration a penal statute, and should receive the same strict construction that is always given to such statutes.

If the appellant does not show on the face of its pleadings that it is acting in contravention of some statute, then the burden of showing it is a criminal — and should be punished, rests upon the party so claiming, and all things necessary — sustain such claim should be pleaded and proven. It does not seem sufficient to make the general allegation, and then say the burden is on the one seeking a right to collect an honest debt, when the full consideration therefor has been received and retained.

The evidence does not show any other or different control over the property by the engineer than was necessary to comply with his duties under the contract, and I am sure this court does not intend to assume that he did what was not contemplated by the contract, when such is neither alleged or proven.

It is true that by the terms of the contract sued on the appellant bound itself to furnish one erecting engineer to superintend the erection of the machinery furnished, there is absolutely nothing in the contract that requires the purchaser to take and utilize his services.

The clause in the contract relating to the engineer in no way affects, or is connected with the other provisions of the con-
175 tract, and the considerations are entirely distinct. The engineers services are no part of the consideration for the sale of the machinery.

The contract provides for the sale of the machinery to the appellees at Stockdale, Texas, at the depot in that town, and when so received at such depot the title and possession passed, subject only to the terms of the contract. After such delivery the appellant had no control over the property, or right to its possession than was given by the contract.

The very terms of the engineering provision of the contract, the nature of the consideration therefor, and its entire independence of its other provisions, renders that part of the contract optional with the purchaser, that is, if the purchaser wishes the services of the engineer, the appellant is bound to furnish the same, but it seems clear that if the purchaser did not see fit to accept the services of such an engineer, the appellant would have no cause of complaint, nor would the purchaser have breached any provision of the contract.

In the opinion this court did not expressly hold that the purchaser was bound to accept the services of the engineer, and of course I do not know the views of the court thereon. My own views are so strong on the theory that the provision of the contract under con-

sideration was optional with the purchaser, that I cannot assume the court took a different view. There is no doubt but what the appellant bound itself to furnish such engineer, but only when requested by the appellees. If that is the proper construction of the contract, and I feel sure the position will not be seriously contested, then we find ourselves in a contract to which its lawfulness, or unlawfulness, will depend wholly on the option of the purchaser. If he takes a notion that it is best to obtain the services of an engineer, and the services are rendered, then the contract is in contravention to the statute, but if he does not request and obtain such serv-
176 ices then the contract is valid and can be enforced.

As we have viewed the law it was believed that the superintending of the erection of machinery furnished was a proper part of the interstate shipment, or interstate transaction. If, however, this court maintains its expressed view on this matter, then I cannot conceive of an option of this nature in a contract rightfully rendering such a contract, void, or valid, at the whim of the purchaser.

From the opinion I conclude the court had in mind that appellant was selling, delivering, and contracting to erect an ice plant, when in fact by the very terms of the contract, as well as in fact, it sold only specific and independent machinery to be put in the ice plant of the appellees at Stockdale, Texas.

There is nothing in the evidence to show that this machinery was connected with any property, which was not a subject of interstate commerce, unless we conclude that it must rest upon some foundation and that must be a part of or connected with Texas soil. Barring the natural assumption that the machinery does rest on soil in Texas, I do not know whether any property had any connection with it, or whether such property was, or was not a subject of interstate commerce.

While I haven't any evidence or statement of facts before me, I have an indefinite recollection that there was evidence that the ice machine had to be so set that it should be connected by belt with an engine that was intended to run the same.

In my reading of the several cases decided in this state, I have been led to believe that unless the pleadings of the fore-ing corporation show that it was doing an unlawful business, it became necessary for the objector to plead a state of facts which would make the contract unlawful, and I have never understood that a construction exemption, or exception, would be subjected to any other
177 rule. If the statute contained any special exception, it might be held incumbent on a party claiming rights to bring itself within such exception, but I doubt if even then the objector would be relieved from the burden of both pleading and proving.

Nothwithstanding what has above been said the writer is clearly of the opinion that by a proper construction of the contract under consideration it is the duty, absolutely, of the purchasers to erect, or install the machinery purchased of the York Company, and the fact that the York Company has agreed, or bound itself to furnish an erecting engineer to superintend does not change the situation,

for all the expense, even for the services of the engineer is paid for by them.

I cannot conceive of its being right to charge the seller with an agreement to erect, when it has no duty to perform in that direction except to furnish a man skilled in the service, and even his expenses and services are being paid for by the purchasers.

If our views heretofore expressed on the proper construction of the contract sued on reflect the real intention of the parties, then the principle expressed in the case of Browning vs. City of Waycross, by the Supreme Court of the United States, reported in U. S. Adv. Op. 1913, p. 578, has no application, for confessedly that was a case where the contract provided for a constructed article in the state, which involved labor as well as material obtained and used in the state, and the original purchase price of the lightning rods included the cost and expenses of the erection.

In our judgment the above case, and the case of Smythe Co. vs. Fort Worth Glass & Sand Company, 142 S. W. 1157, express the same principles, and neither of them, as we construe the contract, control the rights of the parties in this action.

When you consider that there is nothing in the pending contract which requires the York Company to erect the machinery sold, or to do other with it, except to deliver at depot, Stockdale, for the consideration mentioned, and the provision for furnishing
178 erecting engineer to superintend, being entirely independent of the other part of the contract, and based on a separate and independent consideration, it would be a pretty severe construction that would require a determination that the York Company was bound, as a part of its contract, to do anything within the State of Texas, other than to let the purchasers use the ability and skill of some one York Co. might select who knew how to erect such machinery. The purchasers pay, not only for the labor but for the services of the engineer.

The appellant represents that J. A. King, who resides in Floresville, Wilson County, Texas, is the attorney of record of the appellees.

Wherefore, appellant prays that notice according to law be given of this application, and that, on hearing hereof, the judgment affirming the cause heretofore rendered herein be set aside and a rehearing granted, and that further proceedings be had herein as prayed for in appellants original brief.

1/4/15.

N. C. ABBOTT,
Attorney for Appellant,
York Mfg. Co.

Postoffice: Houston, Texas.

Endorsed: #5363. Mo. 6391. York Mfg. Co. vs. V. B. Colley et al. Motion for rehearing. Filed in the Court of Civil Appeals at San Antonio, Texas, Jan. 5, 1915. Jos. Murray, Clerk. Filed in Supreme Court Feb. 8, 1915. F. T. Connerly, Clerk. N. C. Abbott, Attorney, Houston, Texas.

179 *Order of Court on Motion for Rehearing.*

WEDNESDAY, Jan'y 13, A. D. 1915.

No. 5363.

YORK MFG. CO., Appellant,
vs.
V. B. COLLEY et al., Appellees.

Appeal from Wilson.

The motion of appellant for a rehearing, filed Jany. 5, 1915, coming on to be heard, and the Court having duly considered the same, it is ordered that said motion be and is hereby overruled; that appellant, York Manufacturing Company, and its surety, Maryland Casualty Company, pay all costs of this motion.

180 *Application for Writ of Error.*

In the Supreme Court of the State of Texas.

#5363.

YORK MANUFACTURING COMPANY, Plaintiff in Error,
vs.
V. B. COLLEY et al., Defendants in Error.

Petition for Writ of Error to Supreme Court.

Appeal from the District Court of Wilson County, Texas.

Judgment of the trial court affirmed by the court of Civil Appeals for the fourth supreme judicial district, at San Antonio, and the appellants motion for rehearing overruled.

Application for Writ of Error.

To the Honorable Supreme Court of the State of Texas:

Your petitioner, York Manufacturing Company, respectfully represents that, in the above styled and numbered cause, on the 23rd day of December, 1914, the court of civil appeals at San Antonio affirmed the judgment of the trial court in said cause and thereafter, in due time, your petitioner filed its application for a rehearing in said court of civil appeals, which application was thereafter by the said court overruled and denied.

Your petitioner further represents to the court that the said judgment of the court of civil appeals settled the case, as will appear to this honorable court from the following statement of the case:

The petition charges in substance that your petitioner was a corporation organized under the laws of the State of Pennsylvania, and as such corporation was authorized to and engaged in the business of manufacturing and selling ice machinery, and as such was doing a general foreign and interstate business, and was by its articles
181 of incorporation authorized to do and perform all things in said petition mentioned, and the defendants, or appellees herein were residents and citizens of the County of Wilson, State of Texas.

That on or about the 29th day of May, 1912, your petitioner and the defendants in error, V. B. Colley and J. E. Billingsley, entered into a contract in writing by the terms of which your petitioner agreed, at York, in the State of Pennsylvania, to construct for and deliver to them at the railroad station, at Stockdale, Texas, the machinery described in said petition, and in the contract sued on, for use in the ice plant of said defendants, at said Stockdale, Wilson County, Texas.

The said contract of purchase and sale was made at York, Pennsylvania, approved by it at said place in the manner provided for in said contract.

The said defendants promised and agreed to pay for the said machinery the sum of $2,484.00 payable as follows:

Cash on shipment $621.00.

Cash 60 days after arrival of machinery $621.00.

Balance of $1,242.00 to be represented by one note to be drawn for a period of six months, and to bear six per cent interest.

Your petition- in accordance with the terms of said contract delivered all of said machinery called for in said contract and the same was received and accepted by the said defendants and by them placed in their ice plant, and on or about the 10th day of August 1912, accepted the same as having been completed and put in working order.

The first installment of said purchase price, to-wit: $621.00 was paid, and no part of the balance of the purchase price was ever paid, and said defendants failed and refused to pay the balance, or give any note representing said amount.

The said contract contained a provision by the terms of which it was agreed that if the defendants failed to pay any install-
182 ment of the purchase price, or give any note, or notes, as in said contract provided then the York Manufacturing Company had the right to declare all of the unpaid price immediately due and payable, and because of the failure of the defendants your petitioner did declare all installments of said purchase price immediately due and payable.

The petitioner further shows that it furnished an engineer in accordance with the terms of said contract, and said engineer performed 24 days of service for the defendants, and defendants agreed to pay therefor six dollars per day aggregating $144.00, together with actual expenses which amounted to $25.70, of which amount the defendants paid $100.00.

In said petition it was alleged that by the said contract a lien was

reserved to secure the payment of the unpaid purchase price, and said contract was duly filed as a chattel mortgage in the manner prescribed by the statute of Texas.

By the answer of the said defendants it was alleged that the York Manufacturing Company was a corporation organized for pecuniary profit under the laws of Pennsylvania, and that at the time of making the contract sued on was desirous of transacting business in this state and had theretofore transacted business herein and that it had established a general and special office in this state, and that it had in no way, manner or form complied with articles 1314 and 1318 of the Revised Statutes of Texas, and that at the time of making said contract had not nor had it now any permit to do business in this state, nor has it ever filed its articles of incorporation under the provisions of the statutes of this state in the office of the Secretary of State for the purpose of procuring its permit. That at the time aforesaid the York Manufacturing Company was engaged in carrying on the business of the construction and erection of ice making and refrigerating plants and was so engaged in the State of Texas, and that the same was wholly unlawful in this, to-wit:

183 That at the time aforesaid the defendants entered into a contract with the York Manufacturing Company by and through its local agents and employes in the City of San Antonio, Texas, for the construction and erection of an ice making and refrigerating plant in the town of Stockdale, and that at the time of making said contract said transaction and the dealings then and there subsequently had was in no manner or form interstate commerce, but said business was wholly of the nature of material furnished and labor performed in this state which constitutes the doing and carrying on of business in this state without authority of law.

Defendants further charged that they entered into the contract sued on at San Antonio, Texas, for the erection and construction of an ice plant in the town Stockdale, that said contract was in writing and based upon drawings and blue prints furnished by York Manufacturing Company, its agents and employes, and that among other provisions the said contract contained the following:

The York Manufacturing Company to furnish one erecting engineer at $6.00 per day and expenses to superintend the erection of the machinery, * * * furnished by it, the purchaser to furnish one engineer to assist in erecting and putting machinery * * * together and to receive and carry out instructions from the York Manufacturing Company to have entire charge of the plant during the erection of same, and when ready for operation it shall be operated in accordance with the directions given by the representative or engineer of the York Manufacturing Company. * * *

A number of other provisions of said contract were set out in defendants' answer, but none of them are believed to be important on the issue now involved, however, the full contract is attached to the answer of defendants, and can be examined if desired.

184 Paragraph XI of said answer is as follows:

These defendants further allege and say that the material

furnished and the labor performed by the plaintiff under the contract was the furnishing of material and the erection there- of an ice plant for these defendants hereinbefore alleged and that shortly after the execution of said contract the said plaintiff erected ice plant as called for and designated in the contract heretofore referred to and that the labor performed upon said plant by the plaintiff was skilled labor and the erection of ice and refrigerating plants *are* highly technical and require- persons skilled and informed in their proper construction and that these defendants were not skilled and informed in the mechanism and construction of ice plants which was well known to the plaintiff at the time of the entering into the contract aforesaid and said plaintiff being aware of said fact executed the contract as aforesaid and furnished the material and labor for the said plant and erected said ice plant and the said contract is now an executed one an*s* that the said plant should be constructed as hereinbefore alleged which was the construction placed upon it by all the parties thereto and especially these defendants.

In addition to the above the defendants answered by general denial.

Replying to said answer plaintiff admitted it was a corporation organized under the laws of Pennsylvania, and had not obtained a permit to do business in Texas; denies that at the date of said contract, or at any other time, it had transacted business in this state, or that it desired to or did solicit business in this state, other than in the manner and form mentioned; denies that it had or ever did establish a general or special office in this state; denies that on said date, or any other date or time, it was engaged in carrying
185 on the business of constructing and erecting ice and refrigerating plants in the State of Texas, and alleges and says that the making of said contract, selling and the manufacturing of the property therein described, and the delivery thereof, and the doing of all and everything said contract called for was in the performance of an interstate transaction, and that in so performing said contract this plaintiff was engaged in transacting interstate business, and causing to be transported in interstate commerce all of the machinery mentioned in said contract from its plant in the City of York, in the state of Pennsylvania for delivery to the defendants in the state of Texas, and was thereby engaged in interstate commerce, and not subject to the provisions of articles 1314 and 1318 of the Revised Statutes of Texas.

Denies that said contract was entered into by and through its local agents and employes in the City of San Antonio, Texas, or any other place in the State of Texas, with the defendants for the construction and erection of an ice making and refrigerating plant in the town of Stockdale, and denies that it ever entered into any contract with the defendants for any purpose whatever, other than the one mentioned and set forth in the petition, and alleges that the contract was made in York, Pennsylvania, and that the making of said contract, and all that was done thereunder was in the transaction of interstate commerce.

Further replying plaintiff admits that as per the terms of said con-

tract it furnished to defendants one erecting engineer for the purpose of superintending the erection or assembly of the machinery described in the petition, and alleges that defendants agreed to pay for the said engineer the sum of six dollars per day for the
186 services rendered, but denies that it furnished any labor whatever, or any material, or machinery, for the erection or assembly of said machinery, and that all of the machinery sold the defendants was manufactured or obtained for the defendants by the plaintiff in the state of Pennsylvania, or some state other than Texas, and shipped or transported in interstate commerce for delivery to the defendants in the State of Texas; and denies that it ever had possession or control of the machinery or plant, other than to furnish the defendants the said engineer in accordance with the terms and conditions of said contract.

Plaintiff further alleges that it is a corporation of the State of Pennsylvania organized for pecuniary profit and authorized to do an interstate business, and in the carrying out of said purpose and authority it entered into the said contract in the State of Pennsylvania and alleges that the making and performing of said contract was in the conduct of an interstate transaction, and all of the machinery was transported or shipped by common carrier engaged in interstate commerce. That all of said machinery was the subject of interstate commerce, and the plaintiff claims immunity from the terms and conditions of any statute of the State of Texas imposing burdens or restrictions on its right to do an interstate business in legitimate articles of commerce; and alleges that if there is any statute *of* construction thereof which interferes with the purpose and right aforesaid, the same is in violation of Article One (1) Section Eight (8), Clause Three (3) of the Constitution of the United States authorizing Congress to regulate commerce with foreign nations, and among the several states, and for that reason is void.

187 Further replying it is alleged and claimed that the statutes of the State of Texas, being Chapter 17, Title 21 of the 1897 Revised Statutes of Texas, entitled foreign corporations, and particularly articles 745 and 746 thereof; also known as Chapter 24, Title 25, McEachin's Texas Civil Statutes, Annotated, entitled foreign corporations, particularly articles 1314 and 1318 thereof, are unconstitutional and void on the ground of their being repugnant to the provisions of the constitution of the United States.

The trial court without a jury resulted in a judgment that the plaintiff cannot maintain its suit, and it was ordered, adjudged and decreed by the court that the said suit be and the same is, hereby dismissed from the docket of this court, and that the defendants go hence without day and recover of plaintiff all costs in this behalf expended.

The plaintiff appealed, and the court of civil appeals held as follows:

That the making of the contract sued on, and the performance thereof was doing or transacting business in Texas within the meaning of article 1314 of Revised Statutes of 1911, and because thereof

plaintiff was not entitled to maintain its action, and affirm the judgment.

The contract sued on is in the form of a proposal, accepted by the defendants, and the material parts affecting the adverse ruling of the court of civil appeals, are as follows:

This agreement made this 24th day of April 1912 by and between the York Manufacturing Company, a corporation duly organized under the laws of the State of Pennsylvania, having its principal office in the City of York, Pennsylvania, party of the first part, and V. B. Colley and J. E. Billingley, copartnership having its principal office in the Town of Stockdale, Texas, party of the second part, witnesseth:

188 The party of the first part agrees to construct for and deliver to the party of the second part on the R. R. Depot, at Stockdale, Texas, with freight allowed, the machinery apparatus or plant mentioned and described in the specifications hereto attached, which specifications, together with the agreement and guarantees therein contained on the part of each of the parties hereto to be kept and performed, are hereby expressly made a part of this agreement. The premises of the part- of the second part in which said machinery, apparatus or plant is to be placed, are situated in the Town of Stockdale, County of Wilson, State of Texas, at No. — Street.

The party of the second part agrees to pay the party of the first part for said machinery, apparatus or plant the sum of Two thousand four hundred and eighty four dollars $2484.00, as follows, to-wit, payments to be made as follows:

Cash on shipment of machinery $621.00.

Cash 60 days after arrival of machinery, $621.00.

Balance to be evidenced by one note $1242.00, to be drawn for a period of six months, and to bear 6% interest, and to be dated and delivered at the time of the second payment. (p. 13 Tr.)

It is further expressly agreed that the title to and ownership of the machinery, apparatus or plant herein contracted for shall remain in the York Manufacturing Company until the entire purchase price herein agreed to be paid, and all notes and other securities given to secure the same or any part thereof, shall be actually paid in cash; and in case of failure or refusal by the party of the second part to make the payments, or any of them, when due under this contract, or make settlement by the execution and delivery

189 of notes or other obligations as hereinbefore agreed, or to pay any of said notes or obligations when the same shall fall due, then the whole of the unpaid portions of the purchase money, however secured and whenever payable, arising under this contract, shall thereby at the option of the said party of the first part become immediately due and payable.

This contract shall only become operative when the same shall have been approved in writing by the President or Vice-President, and the Secretary or Treasurer of the York Manufacturing Company and attested by its corporate seal. (p. 15, Tr.) The decision of the Court of Civil Appeals being adverse only on the question of doing business in the State of Texas, the following reference to the testimony will be confined to that which applies thereto.

Testimony of V. B. Volley.

I don't remember how long after the signing of this contract it was before they commenced this ice plant; it was some little time though, I think about sixty days, I am not positive on the subject. The erection of the plant was superintended by Mr. Campbell, and he did the biggest part or nearly all the delicate work on the plant, and the work that required expert labor was required of him. Mr. Campbell was representing the York Manufacturing Company. The contract with the York Manufacturing Company was, they had entire charge of the plant. After the erection of the plant and at the time — were testing out the plant he was superintending it and stayed there. We ran the plant *out* several days. I don't just remember the number of days, but we ran it day and night for several days and he stayed there the biggest part of the time, and was very there and hold it until we did. There wasn't any keys to the plant what should be done and not be done, and after the test was
190 made he refused to turn over the plant to us until we signed a clear receipt releasing him from all responsibility of the operation of the plant, and told us if we didn't sign it he would stay there and hold it until we did. There wasn't any keys to the plant but he had possession of it and told us he would stay there until the receipt was signed, and after we signed those papers which he gave us he gave us possession of the plant after it was erected. (pp. *16017*)

Blue prints of the compressor and of the house and location of the machinery are shown by Ex. "A" and "B." I do not know where the blue prints were drawn, but think it came from Mr. Bauderer to us. Bauderer lives in San Antonio. Defendants' Ex. "C" is a plan of the freezing tank, vault and insulation, and the relation of the machinery and the position it occupied.

Cross-examination:

The purchase from York Company does not comprise all the machinery we have in the plant. At the time it was practically all of the machinery in the plant outside of the engine.

I cannot tell when Mr. Campbell reached Stockdale without referring to those papers, but my recollection is it was some time in July of that year. He was there before the machinery reached there. I think he remained in Stockdale about twenty days after the machinery reached there. I don't know how long it took to erect the machinery after it reached there, about twelve or fourteen days, I think, to put in where we could make a test of it. We signed a receipt that the plant was received in good condition and in good running order, I believe, or something to that effect. He demanded that of us before he would deliver entire possession. There were
191 no conditions. At first I told him I didn't like the way the plant was running, and I didn't sign the receipt then. I did not sign it the first time he asked me. I think he asked me three or four days before we did sign it. We signed the receipt the day he told us he wouldn't deliver it to us until we signed the receipt. I re-

member the fact of the plant being charged. It was several days after that that I signed the receipt. (pp. 35-37.)

Signed the papers offered in evidence, showing:
Engineer arrived July 10, 1912.
Machinery arrived July 13th.
Began erecting July 15th.
Ready to charge August 2nd.
Accepted August 10, 1912. (pp. 36-37.)

Testimony of J. E. Billingsley.

Mr. Campbell erected this ice plant for Colley & Billingsley; he was representing York Manufacturing Company. I didn't work on the plant any, and I don't think Mr. Colley did; Mr. Campbell and a helper we hired for him did the work. We had a Munci Engine besides what was bought from the York Manufacturing Company. We divided up the work on installing the engine. I did the carpenter work mostly and put in the studding in the building, and Mr. Campbell put in the ice machinery, and Mr. Colley assisted him and helped put up the engine. Mr. Campbell assisted in putting up the engine; he helped us put it up. Mr. Campbell had charge of the plant while it was being erected. We got possession of it by signing an acceptance for it, the plant had been erected and being in operation about a week. Mr. Campbell had been operating it. He said he didn't ever leave a job until he got his papers on it. He said he wasn't allowed to leave a job until he got his papers for it. That is the way he expressed it. (p. 39.)

Mr. Campbell made a remark to a man that was helping
192 him "They are good fellows to get along with; I have had thunder with other men." I said, "Let's not put that cooler where the blue print shows it," and he said "All right" and he said "I am instructed to comply with the requests as long as I can," but he says "if there is any kick, to put it according to the blue print." That was his orders. It came up over putting the water cooler next to the ice cans. It was not a convenient place and I asked him to put it on the other side of the wall and he said "All right." (p. 40.)

Cross-examination:

We had no trouble with Mr. Campbell at all; we never crossed him. The plant was operated about a week after it was completed. I don't know the purpose of the operation; I didn't have any idea. He had Mr. Colley operating the engine and had him sign as engineer at nine o'clock, twelve, three and six, and he had what he called a log that he put these things on and mailed them to the company every night. My idea then was they guaranteed that it would make three tons of ice a day, and he was sending it to the house. It was a test to see if it would comply with that. He operated it about a week, I suppose it was. (p. 40-41.)

He said "I want to get off from here Saturday night and I want these boys to run all night so I will get the tank froze down." He

says, "I can't leave here until the ice is made in that tank, and I will try to get it ready Saturday, and if you will sign my papers I will leave here. The train leaves at six thirty in the evening and about three o'clock he asked if we would sign his acceptance and let him off. We signed the acceptance then, and he went away that night and that is the last I ever saw of him. (p. 41.)

193 I can't tell how he came to assist in putting up the engine. My understanding was, he didn't tell me, that ice machine had to run so fast, make a certain speed or something like that, and of course it had to be in line, the engine pulley had to be in line with the gas machine pulley. My understanding was he had to operate this plant, and he was doing it for the York Manufacturing Company. I understood we paid for it. I figured we have to have him, the contract said so. It said they were to furnish a man at six dollars a day. They specified the wages and expenses. At the time we didn't have any one here capable of handling that machinery and putting it in; I was not an experienced man myself. It was necessary for us to have somebody to do the work he did, but it wasn't necessary for the York people. I told Bauderer "I can hire hire an engineer for three dollars a day and cut out that six," and he said, "You had better let him come on; they erect them plants and know how." The plant has been in operation ever since. The blue prints that were used came by mail to Mr. Campbell. (pp.41-42.)

Testimony of B. H. Loucks.

Under the provisions of the contract wherein it is stated "The York Manufacturing Company to furnish one erecting engineer at $6.00 per day and expense to superintend the erection of the machinery, apparatus and plant:" we furnished, from July 13th. to August 9th., 1912, an erecting engineer, Mr. Campbell, who was at that time an employe of the York Manufacturing Company travelling out of Chicago under the directions of F. W. Pilsbry, Manager of our General Western Office at Chicago. (p. 46.) The York Manufacturing Company had not, to my knowledge, anything to do with the erection of said machinery or putting up the apparatus

194 or plant for the defendants, excepting the furnishing of the erecting engineer mentioned in said contract. I have said "to my knowledge", because I do not know what Mr. Pilsbry may have done.

The York Manufacturing Company had nothing to do with the operation of the machinery or plant, after the same was erected, except to give directions, through its engineer, Mr. Campbell, for the proper operation of the same. (p. 47.)

I, of course, do not know what the erecting engineer did in and about the erection of said plant, but he was not requested nor required, nor authorized, by the York Manufacturing Company to have anything to do with the erection of any part of the plant, except the machinery which the York Manufacturing Company had sold to the defendants and which is described in the contract sued on. (p. 47.)

I do not know what the engineer actually did on the job, but he was not authorized by the York Manufacturing Company from its main office here to assume or claim any control over the machinery after it was installed, nor to refuse to deliver possession of the same to the defendants until they had in writing accepted the same. He was, however, authorized in all cases where he erected or superintended the erection of machinery for the York Manufacturing Company, to request the purchaser to give a written acceptance in order to show their satisfaction. (pp. 47-48.)

Cross-examination.

We never constructed any ice plants in Texas, but we had up to the time of the making of the contract with the defendants manufactured here the machinery for fourteen ice plants in Texas and installed it in the premises of the purchasers in Texas. We had also, up to that time, manufactured here the machinery for 52
195 ice plants for parties residing in Texas and had superintended the erection of same in their premises in Texas. (pp. 49-50.)

The York Manufacturing Company manufactures its ice machines at York, Pa., and sells and delivers them to people and corporations in all states of the union, and in many foreign countries, and does so under its right to do interstate business. (p. 51.)

It is not a fact that we will allow any one but our own employes to erect these plants under our contracts, but we do insist on having or trying to have one of our erecting engineers familiar with our machinery, to superintend the erection and starting of the apparatus. As a usual thing, neither the purchaser nor his engineers are competent to do this properly without receiving directions and instructions from engineers who are familiar with the system. (11, 52-52).

We made the blue prints in our office. (p. 53).

The evidence above stated and referred to is the substance of all the evidence in the case bearing on the adverse decision of the court of civil appeals. It is the contention of the applicant that the court of civil appeals erred in the application of the law to the contract and other evidence in the case; that the court erred in the interpretation, and effect of the contract as to the issues involved; that the issue involved should be determined by the proper construction of the contract and what is called for therein to be done. And it is further contended that the evidence, when construed with the contract and contract rights, shows that nothing was done except that which was contemplated by the contract.

The evidence relied upon by the applicant for the purpose of showing wherein the court of civil appeals erred in matters of law, consists of the contract itself, and particularly the parts thereof above quoted, and while we think these provisions should not be affected by the oral evidence, have given the said evidence in detail,
196 which shows that in fact there was nothing substantially done that was not called for by the exact terms of the contract.

Your application further contends under the terms of said contract and all material evidence in the record, that the interpretation and

construction of said contract and evidence in the case, and articles 1314 and 1318 of Revised Statutes of Texas, given by the court, are in violation of the provisions of the constitution of the United States relating to interstate commerce, particularly article One (1) Section Eight (8), Clause Three (3) thereof, authorizing Congress to regulate commerce with foreign nations, and among the several states, and for that reason the finding of the Court of Civil Appeals is erroneous, and its judgment an error of law.

Your petitioner now applies to the supreme court for the allowance of a writ of error to the end that said court may review the said cause and the action of the Court of Civil Appeals therein, and correct such action, and as reasons and grounds for the granting of such writ of error, your petitioner assigns the following errors committed by the court of Civil Appeals in affirming said judgment and refusing a rehearing, to-wit:

1. The court erred in refusing and overruling the first and second assignments of error presented to the court, below, because under the contract, evidence and law of the case, your petitioner was doing and conducting an interstate transaction which was protected under the provisions of the constitution of the United States.

2. The court erred in holding and finding that the plaintiff bound itself to deliver a finished plant, with the exception that the
197 appellees should furnish labor necessary to carry out the engineers instructions, because the contract did not provide for the furnishing of a plant, but only certain described machinery.

3. The court erred in holding and finding that under the terms of the contract appellees were compelled to accept the services of an engineer, because the terms of the contract does not make it obligatory on the part of the appellees to accept the services of such engineer.

4. The court erred in holding and finding that the plaintiff contracted to engage in and did engage in strictly local business in installing an ice machinery plant, because under the contract and the law, the making and performing of said contract was a transaction in interstate commerce protected by the commerce clause of the constitution of the United States, and was not doing business in the State of Texas within the meaning of the statutes thereof.

5. The court erred in holding and finding that in making and performing the contract sued on plaintiff was engaged in the transaction of business in this state within the meaning of the statutes, because a proper interpretation and construction of said contract, and all and everything that was done in the performance thereof was incident to and a part of an interstate commerce transaction and protected by the commerce provision of the constitution of the United States, and was not doing business in this state, within the meaning of the statutes thereof.

6. The court erred in holding and finding that the furnishing of an erecting engineer to superintend the erection of the machinery furnished by plaintiff was strictly local business or doing business in this state, because the furnishing of said engineer was at the op-

tion of the defendants, and for their special benefit for the
198 services of which they expressly agreed to pay, and that the same was incident to and a part of an interstate transaction protected by the constitution of the United tSates.

7. The court erred in holding and finding that the plaintiff contracted to or did furnish an erecting engineer to superintend the erection of an ice plant, because the contract only called for an erecting engineer to superintend the erection of the machinery sold defendants by plaintiff.

8. The court erred in holding and finding that the plaintiff bound itself to connect, or superintend the connection of the machinery sold with property in this state which had not been a subject of interstate commerce, because there was no provision in the contract that calls for any such service, nor was there any evidence bearing on that subject other than attaching the belt from the engine to the ice machine.

Statement From the Record.

We would refer the court to the full and complete starement of the pleadings and evidence hereinbefore given, supporting the contention that the Court of Civil Appeals erred in its rulings, and it seems like burdening the court to restate the same. The pleadings and evidence are not only pretty fully stated herein, but you will find that the printed brief furnished the court of Civil Appeals contains a like statement.

We will, however, refer to the general provisions of the contract showing the interstate nature of the sale and purchase, and that the subject matter of the contract consists of machinery which is a legitimate subject of interstate commerce, and the evidence showing conclusively that the transaction of purchase and sale and delivery were strictly interstate.

199 To that provision of the contract relating to the superintendency, the material part of which provides that plaintiff was "to furnish one erecting engineer, at $6.00 per day and expenses to superintend the erection of the machinery, * * * furnished by it, * * * The York Manufacturing Company to have entire charge of the plant during the erection of same, and when ready for operation it shall be operated in accordance with the directions given by the engineer. * * * The limit of time which * * * the engineer is to remain with the plant for the purpose of instructing the purchasers men and making needed adjustments to the machinery * * * shall be days from the date the plant is ready for charging."

We must refer to the former quotation of the substance of all the evidence in the case, showing in fact what was done, and thereby making it clear that nothing was done that could in any way affect the validity of the contract, or that was not contemplated in the very terms of the contract.

You are also referred to the eleventh paragraph of the defendant's answer, showing the advisability of having a technical engineer to superintend the erection of this machinry. (pp. 16017 Tr.)

Authorities.

Miller v. Goodman, 91 Texas, 41.
Lasater v. Percell Mill & Elec. Co., 54 S. W. 425.
Kirkpatrick v. State, 60 S. W. 762.
C. B. Cones & Sons, Mfg. Co. vs. —, 45 S. W. 333.
Shaw Piano Co. vs. Burkey, 54 S. W. 604.
T. & P. Ry. Co. vs. Davis, 54 S. W. 381—Same case, 93 Texas, 378.
S. R. Smythe Co. vs. Ft. Worth, Glass & Sand Co., 142 S. W. 1157.
A. Leschen & Sons Rope Co. v. Moser, 159 S. W. 1018.
French, Finch & Co. v. Kicks, 92 S. W. 1034.
Panhandle Tel. Co. v. Kellogg, 132 S. W. 963.
200 State vs. Rocky Mountain Bell Tell. Co., 71 Pac. 311.
Brennan v. Titusville, 153 U. S. 289, 14 Sup. Ct., 629.
Holder v. Aultman, Miller & Co., 169 U. S. 81, 18 Sup. Ct., Ct., 269.
Caldwell v. North Carolina, 187 U. S. 622, 23 Sup. Ct. 229.
Belle City Mfg. Co. v. Prizzell, 81 Pac. 58.
Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1.
Dixie Cotton Felt Mattress Co. v. Stearns & Foster, 185 F. 431.
Penn. Collieries Co. v. McKeever, 183 N. Y. 98, 75 N. E. 935.
Rock Island Plow Co. v. Peterson, 101 N. W. 616.
Loverin & Brown Co. v. Travis, 115 N. W. 829.
Flint & Walling Mfg. Co. v. McDonald, 114 N. W. 684.
Western Union Tel. Co. v. City of Fremont, 58 N. W. 415.
Browning v. City of Waycross, U. S. Ad. Op. 1914, 578, April 6, 1914.

Remarks.

A statement of the case constitutes an argument about as full and complete as I feel capable of making. Of course the court will examine the printed brief filed with the Court of Civil Appeals and I will endeavor, as far as possible, not to materially repeat herein.

The subject of the contract was ice making machinery and is a legitimate subject of interstate commerce, and it was conceded and held that it was all transported in interstate commerce, and by interstate carriers, and it is bound to maintain that character unless the superintending clause in the contract deprives it of the right it otherwise would have.

The form of the contract is in the nature of a proposition to be operative and effective, on the conditions therein named.

By the form of the proposal and the acts of the parties the contract became operative upon being approved in York Pa. and that
201 the same did become operative May 28th, 1912.

The machinery sold was technical in its make up, requiring skill to erect and put in operation. Of this fact there was no necessity of either alleging or proving, as the defendants had made such fact a part of their answer, wherein it is alleged: "that the labor per-

formed upon the said plant by the plaintiff was skilled labor and the erection of ice and refrigerating plants are highly technical and require persons skilled and informed in the mechanism and construction of ice plants."

In the opinion of the Court of Civil Appeals, after quoting from the Supreme Court of the United States in the case of Browning vs. City of Waycross, uses the following language:

This language suggests that the court may recognize exceptions in cases in which the facts show agreements to supervise the erection, or to erect machinery of such a complex character that the sale thereof is impossible unless such agreement is made. But if such exceptions are recognized by that high court, and must, therefore, be permitted by the state court, the facts creating same ought to be alleged and proven.

In view of the allegations of the defendants in their answer as above referred to, there certainly is no necessity of plaintiff alleging or proving such facts, for what more could have been alleged or proven than that "the labor perform- upon said plant by the plaintiff was skilled labor and the erection of ice and refrigerating plants are highly technical and require persons skilled and informed in the mechanism and construction of ice plants."

The very nature of this contract, and we believe, the proper construction, makes the clause in that contract relating to erecting engineer, one that the purchaser may, or may not avail himself
202 of. It says, "The York Manufacturing Company to furnish" an erecting engineer, but nowhere makes it incumbent on the purchaser to use such engineer, and it seems perfectly clear to the writer that it is a right to, but no obligation on the purchaser. It seems clear that a refusal of such services would not be a breach of such contract. Compensation for machinery, and for engineers services, are entirely distinct, neither depending on the other, therefore it cannot be said the purchaser would be losing anything he had paid for by refusing such services.

Again, by the terms of this contract the erection or installment of the machinery was to be performed by the purchaser. True the seller furnished the engineer for the purpose of superintending the work, but he was to be paid by the purchaser. It is also true that the purchaser was to furnish and pay for all other labor for the erection, hence, it would seem to follow that the purchasers were to, and in fact did erect the machinery for themselves. The contract does provide the charge for the services of the engineer but it does not make that amount due the plaintiff, but does make it the duty of the purchasers to pay that amount to the engineer. The plaintiff would have no contract, or other right to collect that amount from the purchasers, except that their payment, or obligation to the engineer, would subrogate it to the right to collect from the purchasers. Had the purchasers paid the per diem and expenses to the engineer, as by their contract they should have done, then plaintiff would have no cause of action for that service. These considerations, and many others that might be mentioned clearly indicate the severalty nature

of the provisions of the contract, as well as to indicate it was
203 not obligatory on the part of the purchasers to have or use the services of the engineer. Suppose the purchasers, after having made the contract, should have refused the services of such an engineer, wherein there have been any breach of contract, or what cause of action would the plaintiff have had against the defendants. While it is true that the plaintiff obligated itself to furnish an engineer such obligation could only arise when a demand for the engineer was made by the purchaser.

If either of the above constructions are correct, then it seems demonstrated that the clause relating to the services of an engineer is only incidental and cannot affect the rights of the parties on the main contract.

The burden of showing that the plaintiff was acting in violation of a state statute, was on the party so alleging and if it is to be convicted such conviction should rest upon affirmative evidence showing that it has committed a wrong.

The Court of Civil Appeals says engineer was working under direction of F. W. Pilsbry and there is no testimony to show what authority or instructions he was given by Pilsbry.

The contract fixes the authority of the engineer and it does seem as though such authority should have been accepted by the court rather than to speculate as to what might have been. The rights of parties are likely to suffer if courts, in adjusting differences, ignore contract authority for what might or might not have occurred. (p. 5.)

Some stress seems to have been put on the fact that plaintiff furnished blue prints from its home office.

Blue prints are nothing more than suggestions or instructions as to how to best adjust the machinery, and we are surprised in no small degree that advice of this nature should be used as an argument, or in incident, affecting material contract rights. (p. 6.)

204 The court of Civil Appeals contends that plaintiff obligated itself to deliver a finished plant, when the contract only calls for a part of the plant. To arrive at such conclusion one is forced to overlook or ignore all the contract provisions. There is no expression in the contract tending to such a conclusion. On the contrary the machinery sold constituted only a portion of defendants' ice plant, and to assume or hold that plaintiff was obligated to deliver a completed plant would be to make it deliver machinery not sold, or described in the contract.

The contract itself provides for the only possession ever taken of the plant by the engineer, and that was voluntarily conceded when contract was signed. That provision is the "York Manufacturing company to have entire charge of the court during the erection of the same and when ready for operation it shall be operated in accordance with the directions given," and the carrying out of this provision is the only possession the evidence fairly shows. (pp. 6-7.)

The Court of Civil Appeals bases its decision largely on the decision of the Supreme Court of the United States in the case of

Browning vs. City of Waycross, reported in Ad. Op. 1913, p. 578, rendered April 6th, 1914.

That was a case where the foreign corporation sold lightning rods to be delivered in another state. The contract of delivery included the placing of the rods on each building.

In our judgment that case is exactly along the line of the case of Smythe Co. vs. Ft. Worth Glass & Sand Co., 142 S. W. 1157, decided by this court.

Both contracts called for the construction in the state where the purchaser lived, and we have no war to make with that principle.

In that case it was held that when a foreign corporation
205 contracts to and does go into another state to put up lightning rods it is doing business in that state.

It has never been held in that or any other court, so far as we have been able to discover, that when a purchaser does his own constructing, by contract or otherwise, and he deems it advisable to have an expert superintend the construction, and gets that expert from the seller, he would thereby convert what would otherwise be an interstate commerce transaction into an intrastate one.

If, under the facts in this case, the purchaser had undertaken the erection of the lightning rods but had requested of, and the seller had agreed to furnish an expert to superintend the work, and such an arrangement had been carried out, then the principle would have been similar to the case at bar.

The principles in this case are rightfully governed by those laid down in Caldwell v. North Carolina, 187 U. S. 622; Rearick v. Pennsylvania, 203 U. S., 507; Dozier v. Alabama, 218 U. S., 124, and the decisions of different states cited by plaintiff in its brief, and by the court of civil appeals in its opinion.

This case as fairly presented to this court is where a foreign corporation sold to citizens of Texas machinery for the manufacture of ice which is admittedly and strictly an interstate transaction, and in the contract of sale it agreed to furnish an expert to superintend the erection in order to insure successful operation.

Can it be possible that such a transaction invades the rights of the state, and makes a foreign corporation an outlaw, to such an extent as to shut the doors of its courts?

Your petitioner represents that John A. King, who resides in
Floresville, Wilson County, Texas, is attorney *if* record for
206 the appellees.

Wherefore, petitioner prays for writ of error in said cause to the end that said cause may be brought before this court, and the aforesaid errors reviewed and corrected.

N. C. ABBOTT,
Attorney for Plaintiff in Error.

Postoffice: Houston, Texas.

Endorsed: #5363. York Mfg. Co. v. V. B. Colley et al. Application for Writ of Error. Filed in the Court of Civil Appeals, at San Antonio, Texas, Feb. 4, 1915. Jos. Murray, Clerk. N. C. Abbott, Attorney, Houston, Texas.

207 *Judgment of the Supreme Court.*

In Supreme Court of Texas.

YORK MANUFACTURING COMPANY
vs.
V. B. COLLEY et al.

From Wilson County, Fourth District.

December 1st, 1915.

This day came on to be heard the application of York Manufacturing Company for a writ of error to the Court of Civil Appeals for the Fourth District and the same having been duly considered, it is ordered that said application be refused.

That the applicant, York Manufacturing Company and its surety, Maryland Casualty Co. pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said Court, this the 17th day of Dec., A. D., 1915.

F. T. CONNERLY, *Clerk,*
By H. L. CLAMP, *Deputy.*

Endorsed: Application No. 9208. York Manufacturing Company, vs. V. B. Colley, et al. Copy of Judgment in Supreme Court. Application for writ of error refused. Filed in the Court of Civil Appeals at San Antonio, Texas, Dec. 18, 1915. Jos. Murray, Clerk.

208 In the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, at San Antonio.

#5363.

YORK MANUFACTURING COMPANY, Appellant,
v.
V. B. COLLEY et al., Appellees.

To the Honorably W. S. Fly, Chief Justice:

Now comes your petitioner, York Manufacturing Company, appellant in the above numbered and entitled cause, and represents to the court, that this cause was commenced in the district court of Wilson County, Texas, while said cause was pending in said court and on the trial thereof, on to-wit, the 12th. day of May 1914, said court rendered a judgment therein in favor of the appellees dismissing the said cause for that the plaintiff, your petitioner, being a foreign cor-

poration, and not having procured a permit to do business in the State of Texas, was not authorized to make the contract sued on and to do and perform the business set forth in said contract in the State of Texas; that within the time prescribed by the rules of said court the plaintiff therein, your petitioner, filed a motion to set aside said judgment and grant a new trial therein, and the same was by the said court in all things refused and overruled, whereupon said cause was appealed to this court and by judgment rendered herein on the 14th. day of December 1914 the said judgment of the said district court was in all things affirmed; that within the time prescribed by law and the rules of this court your petitioner filed a motion for rehearing which was by this court refused and overruled; that within thirty days thereafter your petition- made application for a writ of error to the Supreme Court of the State, and the same with the record hereof was presented to the supreme court, and on the first day of December 1915, the said application was by said court refused, the said supreme court thereby refusing to take, hear and determine the said cause and the errors therein complained of, and did then and there refuse to grant a writ of error, or take jurisdiction
209 herein, and the papers therein were returned to this court.

In this cause and the decision thereof there was drawn in question the validity of a state statute on the ground of its being repugnant to the constitution and laws of the United States, and the decision was in favor of the validity of such statute.

In this cause and the decision thereof there was drawn in question the validity of an authority exercised under the commerce clause of the constitution of the United States, and the decision was against the authority so exercised.

In this cause and the decision thereof there was drawn in question the validity of an authority exercised under the State of Texas on the ground of its being repugnant to the constitution of the United States, and the decision is in favor of its validity.

Your petitioner conceives itself aggrieved by the said judgment so entered and confirmed against it, and this being the highest court in the State of Texas in which a decision in this case can be had, would respectfully pray the allowance of a writ of error returnable to the Supreme Court of the United States for a review of the errors specified by it in assignments of error this day filed herewith in this cause, and to fix a cost bond incident to the prosecution of such writ of error.

And it further prays for such other relief in the order as this application may merit.

N. C. ABBOTT,
Attorney for Petitioner.

210 In the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, at San Antonio.

5363.

YORK MANUFACTURING COMPANY, Appellant,
v.
V. B. COLLEY et al., Appellee.

On application of the petitioner, York Manufacturing Company, a writ of error is herein granted, in accordance with its application therefor, returnable to the Supreme Court of the United States, upon giving a bond for costs, conditioned as required by the rules of this court, in the sum of Five hundred ($500.00) Dollars.

San Antonio, Texas May 25th 1916.

W. S. FLY,
Chief Justice of Said Court.

[Endorsed:] #5363. York Manufacturing Company v. V. B. Colley, et al. Petition for Writ of Error. Filed in the Court of Civil Appeals at San Antonio, Texas, May 27, 1916. Jos. Murray, Clerk. N. C. Abbott, Attorney, Houston, Texas.

211 In the Supreme Court of the United States.

No. in State Court 5363.

YORK MANUFACTURING COMPANY, Plaintiff in Error.
vs.
V. B. COLLEY et al., Defendants in Error.

Now comes the York Manufacturing Company, plaintiff in error, and files this its assignments of error, and represents to the court that there is error in the proceedings and record in the above styled and numbered cause in the state court, in this, to-wit:

First.

The state court of Texas erred in denying the plaintiff in error the right to maintain this action in the state court to recover against the defendants in error, on the contract sued on, the making and performance of said contract being an interstate transaction under the commerce clause of the constitution of the United States.

Second.

The contract sued on and its performance, according to the terms thereof, was an interstate transaction under Article One, Section Eight, Clause Three of the constitution of the United States, granting to congress the right to regulate commerce with foreign nations,

and among the several states, and the state court erred in finding and holding it was an intrastate transaction and subject to the provisions of the statutes of the State of Texas, restricting the right of foreign corporations to do business in the state, being Articles 1314 and 1318 of the Revised Civil Statutes of the State of Texas.

Third.

The state court erred in finding and holding that the plaintiff in error, under the terms of the contract sued on, bound itself to deliver a finished plant—the contract and evidence showing that the machinery sold and to be installed was only a portion of the manufacturing plant already in existence.

212 Fourth.

The state court erred in finding and holding that the plaintiff in error contracted to engage in and did engage in the strictly local business of installing an ice manufacturing plant, and that the business of superintending the erection of the machinery sold, as set forth in said contract, was strictly local business.

Fifth.

The state court erred in finding and holding that the plaintiff in error bound itself to connect, or superintend the connection of the machinery sold, with property in the State of Texas which had not been the subject of interstate commerce, because there was no provision in the contract calling for such service, nor does the evidence show that any such service was performed, other than attaching a belt from an engine to the ice machine.

Sixth.

The state court erred in finding and holding that it was incumbent on the plaintiff in error to plead the technical nature of the machinery sold, as the duty was on the defendants — the invalidity of the contract, but if there are any circumstances under which such a pleading is necessary, the same was waived or made unnecessary in this case, for that the defendants in error had pleaded that fact, in the following language: "The labor performed upon this plant by the plaintiff was skilled labor, and the erection of ice and refrigerating plants *are* highly technical and requires persons skilled and informed in the mechanism and construction of ice plants."

Seventh.

The contract being made in Pennsylvania for the sale and shipment of machinery from said state to Texas; purchaser to install the machinery at *their* own expense; the seller agreeing to furnish an engineer, at expense of purchaser, to superintend erection of ma-

chinery sold; the furnishing of such engineer and his compensation being distinct from the purchase price of the machinery, the same being collateral to the contract of sale and purchase, and wholly optional with the purchaser, constituted an interstate commerce transaction, and not subject to the provisions of the state statutes.

NEWTON C. ABBOTT,
N. C. ABBOTT,
Att'y for Petitioner.

212½ [Endorsed:] York Manufacturing Company, plaintiff in error, v. V. B. Colley, et al., defendants in error. Assignments of error. Filed in the Court of Civil Appeals of San Antonio, Texas, May 27, 1916. Jos. Murray, Clerk. N. C. Abbott, Houston, Texas Attorney.

213 *Bond.*

In the Supreme Court of the United States.

YORK MANUFACTURING COMPANY, Plaintiff in Error,
vs.
V. B. COLLEY et al., Defendants in Error.

Know all men by these presents:

That we, York Manufacturing Company, as principal, and Maryland Casualty Company of Baltimore, Maryland, as surety, are held and firmly bound unto V. B. Colley and J. E. Billingsley, defendants in the above entitled case, in the full sum of Five Hundred ($500.00) Dollars, to be paid to said defendants, their heirs or assigns, to which payment well and truly to be made we bind ourselves and *such* of us jointly and severally, firmly by these presents. Dated this the 26th. day of May, A. D., 1916.

Whereas, lately at the Court of Civil Appeals of the Fourth Supreme Judicial District of Texas, at San Antonio, a judgment was rendered against your petitioner approving and affirming a judgment rendered in same case in Wilson County, Texas District Court, and your petitioner, York Manufacturing Company having obtained a writ of error to the Supreme Court of the United States, and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the said cause, and a citation directed to the said V. B. Colley and J. E. Billingsley, citing and admonishing them to be and appear at the Supreme Court of the United States, at Washington, D. C. within thirty days from date thereof.

Now, the condition of the above obligation is such that if the above named York Manufacturing Company shall prosecute said writ to effect and answer all costs, if it fail to make its plea good, then this obligation shall be void, otherwise to remain in full

214 force and virtue.

YORK MANUFACTURING COMPANY,
By N. C. ABBOTT, *Attorney.*
MARYLAND CASUALTY COMPANY,
By EDWIN H. DUMBLE, *Attorney in Fact.*

Countersigned by—
JNO. C. TOWNES, JR.,
Attorney in Fact.

Approved and ordered filed this 27th. day of May, 1916.
W. S. FLY,
Chief Justice, Court of Civil Appeals, Fourth Supreme Judicial District of Texas.

Endorsements on Bond: York Manufacturing Company v. V. B. Colley et al. Cost Bond. Filed in the Court of Civil Apeals at San Antonio, Texas, San Antonio, Texas, May 27, 1916. Jos. Murray, Clerk.

215 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America to the Honorable the Judges of the Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of said State in which a decision could be had in the said suit between the York Manufacturing Company, and V. B. Colley et al., wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilge, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said York Manufacturing Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings afore-
216 said, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 8th day of June in the year of our Lord one thousand nine hundred sixteen.

[The Seal of the U. S. District Court, Western District, San Antonio, Texas.]

Attest:

D. H. HART,
Clerk District Court United States,
Western District of Texas.

Allowed:

W. S. FLY,
Chief Justice Court of Civil Appeals,
Fourth Supreme Judicial District of Texas.

Return to Writ.

UNITED STATES OF AMERICA,
Court of Civil Appeals, Fourth Supreme Judicial District of Texas:

In obedience to the commands of the within Writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Court of Civil Appeals, Fourth Supreme Judicial District of Texas, in the City of San Antonio, this the 19th day of June, A. D., 1916.

[Seal Court of Civil Appeals of the State of Texas.]

JOS. MURRAY, *Clerk.*

[Endorsed:] York Mfg. Co. vs. V. B. Colley et al. Writ of Error. Filed in the Court of Civil Appeals at San Antonio, Texas. Jun- 8, 1916. Jos. Murray, Clerk.

217 *Certificate of Lodgment.*

Court of Civil Appeals, Fourth Supreme Judicial District of Texas.

I, Jos. Murray, Clerk of the said Court, do hereby certify that there was lodged with me, as such Clerk, on June 8, A. D. 1916, in the matter of York Manufacturing Company vs. V. B. Colley et al.—

1. The original bond, of which a copy is herein set forth;
2. Two copies of the writ of error, as herein set forth.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in San Antonio, Texas, this June 8, A. D., 1916.

[Seal Court of Civil Appeals of the State of Texas.]

JOS. MURRAY,
Clerk Court Civil Appeals, Fourth Supreme Judicial District of Texas.

218 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to V. B. Colley et al., Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, wherein the York Manufacturing Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, this 8th day of June, 1916.

[Seal Court of Civil Appeals of the State of Texas.]

W. S. FLY,
Chief Justice Court of Civil Appeals,
Fourth Supreme Judicial District of Texas.

Attest:
JOS. MURRAY,
Clerk Court of Civil Appeals,
Fourth District of Texas.

219–221 FLORESVILLE, TEXAS, June 8, 1916.

I, attorney of record for the defendants in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

JAMES A. KING,
Attorney for V. B. Colley et al.,
Defendants in Error.

[Endorsed:] York Mfg. Co. *vs.* V. B. Colley et al. Citation. Filed in the Court of Civil Appeals at San Antonio, Texas, Jun- 8, 1916. Jos. Murray, Clerk.

* * * * * * *

222 Court of Civil Appeals, Fourth Supreme Judicial District of Texas.

I, Jos. Murray, Clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and all proceedings in the case of the York Manufacturing Company, Plaintiff in error, vs. V. B. Colley et al., Defendants in error, and also of the opinion of the Court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in San Antonio, Texas, this 19th day of June, A. D. 1916.

[Seal Court of Civil Appeals of the State of Texas.]

JOS. MURRAY,
Clerk Court of Civil Appeals,
Fourth Supreme Judicial District of Texas.

223 In the Supreme Court of the United States, October, 1916, Term.

No. 534.

YORK MANUFACTURING COMPANY, Plaintiff in Error,
v.
V. B. COLLEY et al., Defendants in Error.

Statement of the Points on Which Plaintiff in Error Intends to Rely for the Reversal of the Judgment Herein, and the Parts of the Record Which it Thinks Necessary for the Consideration Thereof.

Statement of Points.

1. The plaintiff in error is a foreign corporation domiciled in the State of Pennsylvania, and the defendants in error reside in and are citizens of the State of Texas.

2. The parties entered into a contract for the sale and delivery of ice machinery to be manufactured in or shipped from the State of Pennsylvania by plaintiff in error to the defendants in error in the State of Texas, and the shipment was made and contract fully performed by sellers.

3. The cause of action sued on was a part of the purchase price of the machinery so sold and delivered, the defence to which was that plaintiff in error was a foreign corporation organized for pecuniary profit, and not having complied with the statutes of Texas in reference to filing its articles of incorporation with the Secretary of State and obtain a permit to do business in Texas, could not maintain an action in the state courts for the enforcement of the contract.

4. The cause of action sued on was an interstate commerce transaction, and plaintiff in error claims immunity under Article One, Section Eight, Clause Three of the Constitution of the United States, grant- to Congress the right to regulate commerce among the several states.

5. The cause of action being an interstate transaction, the statutes of Texas could not impose restrictions thereon, and statutes on the subject had no application thereto, or if such statute did, or purported to restrict, or regulate interstate commerce, contrary
224 to the provisions of the constitution, or acts of congress, the same would be null and void.

6. That part of the contract sued on by which the seller agreed to

furnish an erecting engineer to superintend the erection of the machinery sold, was collateral to the contract of sale and purchase, based on a separate and distinct consideration to be paid to the engineer, and optional with the purchaser, did not control or affect the interstate character of the transaction.

7. The furnishing of an erecting engineer by the seller to superintend the erection of the machinery sold, did not change the contract from an interstate to an intrastate transaction.

8. The contract sued on having been made in Pennsylvania by a foreign corporation for the sale and shipment of ice machinery, a legitimate article of interstate commerce, from the State of Pennsylvania to and into the State of Texas, and there delivered by common carrier to the purchasers, constituted an interstate transaction, to which the statutes of Texas under consideration had no application, and the fact that there was incorporated in said contract a provision by which the seller agreed to furnish an erecting engineer to superintend the erection of the machinery sold, based on a separate and distinct consideration payable to such engineer, would not change the interstate nature of the transaction, nor would the voluntary act of the engineer in the doing of anything outside of the terms of the contract, affect the nature of the contract, or the rights of the parties thereunder.

9. A foreign corporation has the right under the constitution of the United States to contract for and make sale and delivery of machinery or other legitimate articles of interstate commerce, to be shipped from one state and delivered to the purchasers in another, and the latter state is not justified by legislation, or judgment of court, to place restriction thereon, or refuse the aid of the state courts for the enforcement of the contract, or collection of the purchase price.

225 *Parts of the Record Necessary for Printing.*

1. Last Amended Petition	Page	74
2. Last Amended Answer of Defendants, including exhibits	"	84
3. Last Amended Reply	"	115
4. Judgment of State Court	"	124
5. Amended Motion for New Trial	"	126
6. Order Overruling Motion for New Trial	"	128
7. Assignments of Error	"	129
8. Conclusions of Fact	"	155
9. Conclusions of Law	"	156

From the statement of facts print the following:

a. "Original specifications and contract offered and admitted in evidence and appearing in the record, but not printed because an exact copy is attached to defendants' answer and is printed therewith, except that original contract shows date of approval by York Manufacturing Company, at York, Pa. the 28th day of May 1912, and is signed by Ork Manufacturing Company by W. L. Glatfelter, President, and B. L. Loucks, Secretary".

b. All the direct testimony of V. B. Colley down to where counsel rst hands paper to witness, and witness says it is a blue print of the ompressor furnished by York People. (Omit balance of direct tes- imony of Colley and all exhibits.)

c. All cross examination of V. B. Colley, and all exhibits in con- ection therewith.

d. All the re-direct examination of V. B. Colley.

e. All the direct and cross examination of B. H. Loucks, omitting exhibits,

226 *f.* All direct and cross examination of J. E. Billingsley.

g. Agreement of counsel and certificate of judge to state- ment of facts.

10. Opinion Court Civil Appeals	Page	160
11. Judgment Court Civil Appeals	"	171
12. Motion for Rehearing	"	172
13. Order denying Motion for Rehearing	"	179
14. Application for Writ of Error	"	180
15. Judgment of Supreme Court of State refusing application for Writ of error	"	207
16. Petition for Writ of Error	"	208
17. Order Allowing Writ of Error	"	210
18. Assignment of Errors	"	211
19. Bond on Writ of Error	"	213
20. Writ of Error	"	215
21. Clerk's return to Writ of Error	"	216
22. Certificate of Lodgement	"	217
23. Citation and service	"	219
24. Clerk's certificate	"	222

N. C. ABBOTT,
Attorney for Plaintiff in Error.

Copy of the above delivered to J. A. King, Floresville, Texas, attorney of record for defendants in error, the 13th day of July A. D. 1916.

N. C. ABBOTT.

227 [Endorsed:] 534-16/25364. No. 534. October 1915 Term. York Manufacturing Company, Plaintiff in Error, v. V. B. Colley et al. Designation of parts of record by plaintiff in error for printing. N. C. Abbott, Att'y for Plff. in Er., Houston, Texas.

228 [Endorsed:] File No. 25364. Supreme Court U. S. October term, 1916. Term No. 534. York Manufacturing Company, Pl'ff in Error, vs. V. B. Colley et al. Statement of points to be relied upon and designation by plaintiff in error of parts of record to be printed. Filed July 24, 1916.

Endorsed on cover: File No. 25,364. Texas, Fourth Supreme Judicial District, Court of Civil Appeals. Term No. 534. York Manufacturing Company, plaintiff in error, vs. V. B. Colley et al. Filed June 26th, 1916. File No. 25,364.

IN THE

Supreme Court of the United States

YORK MANUFACTURING COMPANY,
Plaintiff in Error,

v.

V. B. COLLEY ET AL.,
Defendants in Error.

No. 534.
October 1916 Term.

Writ of Error to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas.

BRIEF OF PLAINTIFF IN ERROR.

By instrument dated April 24th, 1912, and approved by the York Manufacturing Company May 29th, 1912, (Tes. Loucks p. 6) the plaintiff in error, York Manufacturing Company contracted to and did sell defendants in

error, V. B. Colley and J. E. Billingsley the ice machinery involved in this action. (Contract pp. 27-40).

The plaintiff in error is a corporation of the State of Pennsylvania, with its principal office at York, in said State, (Tes. Loucks p. 13) and the defendants in error are residents of and reside in Wilson County, Texas, having their ice plant located at Stockdale in said County. (Tes. Colley p. 1).

All of said machinery was delivered to the defendants in error at Stockdale, Wilson County, Texas, and was accepted August 10th, 1912, in writing, as per the terms of the contract. (p. 3).

Because of the refusal to make the second payment in said contract mentioned and execute and deliver a note for the balance of the purchase price, this action was commenced in the District Court of Wilson County, Texas, to recover the unpaid portion of the contract price, said action being wholly based on the said contract.

The only defense presented was that the plaintiff in error was at the time of making said contract a corporation organized for pecuniary profit under and by virtue of the laws of the State of Pennsylvania, established a general and special office in Texas, and was transacting business therein without complying with the statutes and obtaining a permit therefor. (Ans. p. 21).

Replying thereto the plaintiff in error admitted it was a corporation organized under the laws of Pennsylvania, and had no statutory permit to do business in the State of Texas. It then alleged that the contract sued on, and the performance thereof, was in the conduct of an interstate commerce transaction to which the statutes of Texas have no application, or if said statutes had any application to the transaction interfering with a constitu-

tional right, it was void as contravening the provisions of the constitution of the United States relating to interstate commerce. (pp. 41-45).

Trial was had on that issue and on the 12th day of May, 1914 the district judge found and rendered judgment for the defendants in error, holding, in substance, that the plaintiff in error had violated all the provisions of the state statute, and had no standing in court to sustain its rights, and therefore dismissed its suit. (Judg. p. 45, finding p. 51).

On appeal the court of civil appeals affirmed the judgment of the district court on the ground that in the transaction defendant in error was doing business in the State of Texas in violation of the Texas statute. (pp. 52-59).

From the judgment of the court of civil appeals the plaintiff in error made application to the Supreme Court of the State of Texas for a writ of error to review the judgment of the court of civil appeals, and the district court, but the said Supreme Court refused to entertain such application, and the matter was remanded to the court of civil appeals. (p. 81).

Application was then made to this court for writ of error to the ocurt of civil appeals where judgment in this case was finally entered, that being the highest court in the State of Texas in which a decision in this case can be had, and the writ of error was allowed by W. S. Fly, Chief Justice of said Court of Civil Appeals. (pp. 81-89). Statement of points filed and printed with the record. (p. 89).

The material parts of the contract involved in this action are as follows:

This agreement made this 24th day of April, 1912,

by and between York Manufacturing Company, a corporation duly incorporated under the laws of the State of Pennsylvania, having its principal office in the City of York, York County, Pennsylvania, party of the first part, and V. B. Colley and J. E. Billingsley copartnership having its principal office in the town of Stockdale, Texas, party of the second part,

WITNESSETH: That party of the first part agrees to construct for and deliver to the party of the second part on the R. R. Depot of Stockdale, Texas, with freight allowed, the machinery, apparatus or plant mentioned and described in the specifications hereto attached, which specifications, together with the agreement and guarantees therein contained on the part of each of the parties hereto to be kept and performed, are hereby expressly made a part of this agreement. The premises of the party of the second part, in which said machinery, apparatus or plant is to be placed, are situated in the town of Stockdale, County of Wilson, State of Texas, at No. — Street.

The party of the second part agrees to pay the party of the first part for said machinery, apparatus or plant, the sum of two thousand four hundred and eighty-four dollars as follows: to-wit: Cash on shipment of machinery $621.00, cash 60 days after arrival of machinery $621.00. Balance to be evidenced by one note of $1242.00, to be drawn for a period of six months and to bear 6 per cent interest and to be dated and delivered at the time of the second payment. (pp. 37-38).

This contract shall only become operative when the same shall have been approved in writing by the president or vice president, and secretary or treasurer of the York Manufacturing Company and attested by its seal. (p. 40).

The specifications contain the following provision:

The York Manufacturing Company to furnish one engineer at $6.00 per day and expenses, to superintend the erection of the machinery, apparatus or

plant furnished by it; the purchaser to furnish one engineer to assist in erecting and putting machinery, apparatus or plant together and to receive and carry out instructions from the York Manufacturing Company in the handling of same. The York Manufacturing Company to have entire charge of the plant during the erection of same, and when ready for operation it shall be operated in accordance with the directions given by the representatives or engineer of the York Manufacturing Company. * * * * The purchaser hereby agrees to employ none but careful and competent employes, and to properly operate the machinery, apparatus or plant, to furnish needed engineers, firemen, fuel, steam, water, oil, waste, and other incidentals required or proper for the purpose, and shall at all times render friendly assistance, as and when required by the York Manufacturing Company.

Purchaser will furnish all needed labor to erect the herein specified machinery. (pp. 33-34).

The contract and business of furnishing this machinery was obtained by one C. J. Bauderer, a traveling salesman for the York Manufacturing Company who was authorized to solicit and take orders for its machinery and to submit them to it for approval. He exercised this authority during his employment. (Tes. Loucks p. 6). The only authority he had from the York Manufacturing Company with reference to the sale of the property described in the contract sued on or the execution or delivery of said contract, was to take the order by having the purchasers sign it and by signing it himself, and submit it thus signed to the York Manufacturing Company, at York, Pennsylvania, for approval. (Tes. Loucks p. 6).

The statutes of Texas involved in this proceedings, read as follows:

Art. 1314.

Hereafter any corporation for pecuniary profit,

except as hereinafter provided, organized or created under the laws of any other state, or of any territory of the United States, or of any municipality of such state, or territory, or of any foreign government, sovereignty or municipality, desiring to transact business in this state, or solicit business in this state, or establish a general or special office in this state, shall be, and the same is hereby required to file with the secretary of state a duly certified copy of its articles of incorporation; and, thereupon, the secretary of state shall issue to such corporation a permit to transact business in this state.
Art. 1318.

No such corporation can maintain any suit or action, either legal or equitable, in any of the courts of this state upon any demand, whether arising out of contract or tort, unless at the time such contract was made or tort committed the corporation had filed its articles of incorporation under the provisions of this chapter in the office of the secretary of state for the purpose of procuring its permit.

ASSIGNMENTS OF ERROR.

FIRST.

The state court of Texas erred in denying the plaintiff in error the right to maintain this action in the state court to recover against the defendants in error, on the contract sued on, the making and performing of said contract being an interstate transaction under the commerce clause of the constitution of the United States. (p. 83).

SECOND.

The contract sued on and its performance, according

to the terms thereof, was an interstate transaction under Article One, Section Eight, Clause Three of the constitution of the United States, granting to congress the right to regulate commerce with foreign nations, and among the several states, and the state court erred in finding and holding it was an intrastate transaction and subject to the provisions of the statutes of the State of Texas, restricting the right of foreign corporations to do business in the state, being Articles 1314 and 1318 of the Revised Civil Statutes of the State of Texas.

THIRD.

The state court erred in finding and holding that the plaintiff in error, under the terms of the contract sued on, bound itself to deliver a finished plant—the contract and evidence showing that the machinery sold and to be installed was only a portion of the manufacturing plant already in existence.

FOURTH.

The state court erred in finding and holding that the plaintiff in error contracted to engage in and did engage in the strictly local business of installing an ice manufacturing plant, and that the business of superintending the erection of the machinery sold, as set forth in said contract, was strictly local business.

FIFTH.

The state court erred in finding and holding that the

plaintiff in error bound itself to connect, or superintend the connection of the machinery sold, with the property in the State of Texas which had not been the subject of interstate commerce, because there was no provision in the contract calling for such service, nor does the evidence show that any such service was performed, other than attaching a belt from an engine to the ice machine.

SIXTH.

The state court erred in finding and holding that it was encumbent on the plaintiff in error to plead the technical nature of the machinery sold, as the duty was on the defendants (to show) the invalidity of the contract, but if there are any circumstances under which such pleading is necessary, the same was waived or made unnecessary in this case, for that the defendants in error had pleaded that fact, in the following language: "The labor performed upon this plant by the plaintiff was skilled labor, and the erection of ice and refrigerating plants are highly technical and requires persons skilled and informed in the mechanism and construction of ice plants."

SEVENTH.

The contract being made in Pennsylvania for the sale and shipment of machinery from said state to Texas; purchaser to install the machinery at their own expense; the seller agreeing to furnish an engineer, at expense of purchasers, to superintend erection of machinery sold; the furnishing of such engineer and his compensation be-

ing distinct from the purchase price of the machinery, the same being collateral to the contract of sale and purchase, and wholly optional with the purchasers, constitute an interstate commerce transaction, and not subject to the provisions of the state statutes.

QUESTIONS INVOLVED.

1. Did the sale and delivery of the machinery mentioned in the contract, by a foreign corporation to citizens in Texas, through a traveling salesman, or solicitor, on the terms and conditions mentioned therein, constitute an interstate commerce transaction, protected by the constitution of the United States relating to interstate commerce, as against the statutes of the State of Texas?

2. Did the clause in said contract by which the plaintiff in error agreed to furnish an engineer at the expense of the purchasers to superintend the erection of the machinery sold, and the performance of that duty, deprive the transaction of its interstate character?

3. Did the making and carrying out of the terms and conditions of the contract sued on, including the furnishing of the engineer at the expense of the purchasers to superintend the erection, constitute doing business in Texas within the meaning of the Texas statute, and if so is that statute effective when applied to an interstate transaction?

MANNER IN WHICH QUESTIONS WERE RAISED.

All questions involved in this proceedings were raised

by the answer of defendants in error (page 21), and the reply of the plaintiff in error, (pp. 40-45) and they were contended for by plaintiff in error in all stages of the proceedings, the decisions of the state courts were based thereon, and were adverse to plaintiff in error.

Among other allegations the reply containes the following:

Par. 20, page 44:

For a further reply to said answer the plaintiff represents to the court that as such corporation it is authorized among other things, to engage in the business of manufacturing and selling refrigerating machinery, material, apparatus and supplies, and that it maintains its manufacturing plant in the City of York, State of Pennsylvania; that the contract sued on in this case was made by and between the plaintiff and the defendants in the City of York, in the State of Pennsylvania; that in and by said contract plaintiff agreed to manufacture for the defendant and deliver to them in the Town of Stockdale, in the State of Texas, all of the machinery, material and apparatus mentioned in said contract, and that in the performance of said contract it manufactured and furnished all of said machinery, material and apparatus at its said plant in the State of Pennsylvania, and shipped or caused to be shipped by common carrier, from its said manufacturing plant in the State of Pennsylvania to the defendants in Stockdale, in the State of Texas, and there to be delivered to the defendants as provided in said contract. And alieges the making of said contract by this plaintiff, and in the performance and compliance with the terms thereof by it as aforesaid, was in the **conduct of an interstate transaction** and constituted interstate commerce, and was free from any restrictions or impositions, and any regulations by the State of Texas, and was, and is, not subject to the terms and provisions of any statute of the State of Texas imposnig burdens, restrictions or impositions thereon, or any of the rights or privileges of this plaintiff to do an interstate business

in interstate commerce in legitimate articles of commerce, and that the same was and is, not subject to the provisions of Articles 1314 and 1318 of the Revised Statutes of Texas. And plaintiff further alleges that if there is any statute imposing burdens, restrictions, or impositions thereon, or on the right or privilege of this plaintiff to do an interstate business in interstate commerce, in the legitimate articles aforesaid, or if any statute of the State of Texas shall be so construed as to interfere with the purpose, rights and privileges of this plaintiff in said transaction as aforesaid the same is in violation of Article One (1), Section Eight (8), Clause Three (3) of the Constitution of the United States, wherein it is provided that "Congress shall have power to regulate commerce with foreign nations and among the several states and with Indian tribes."

ARGUMENT.

The record discloses no conflict of any material fact, and shows distinctly the following state of facts:

The plaintiff in error is a corporation of Pensnylvania, (Tes. Loucks p. 13), having its domicile in that state, engaged in the manufacture and sale of ice machinery, having its traveling salesmen in the State of Texas who solicits the sale of machinery in question to the defendants in error and in pursuance thereof the machinery was delivered to the defendants in error in the State of Texas. (Tes. Loucks p. 6). The sale was evidenced by a written contract, showing the terms and conditions, approved in York, and became a Pennsylvania contract. It contained a provision that the seller would furnish an engineer, at the expense of the buyer, to superintend the erection of the machiney sold. (p. 33). All of the provisions of the contract was carried out by the seller.

We contend that the transaction was purely interstate commerce, no part of the contract calling for the seller to do any local business in its performance; that the clause relating to the furnishing of an engineer to superintend erection was for the benefit of the purchaser, if he saw fit to avail himself thereof, collateral or incidental to the contract, based on a distinct and independent consideration, and really but a reasonable, convenient, and essential part of the interstate shipment, or transaction.

The Texas court of civil appeals holds and treats the main transaction as an interstate one free from the conditions of the Texas statutes, but contends that when the engineer superintending the erection, although requested and paid by the purchaser, places the machinery on the foundation prepared for it, or connects it with other machinery with which it is to be operated, he thereby connects it with property in Texas which had not been the subject of interstate commerce, and then propounds the question: "Does the state have to permit such local business to be conducted without a permit because the material to be erected into a finished plant and then delivered to the buyer was ordered from a foreign corporation and shipped from its domicile in another state. (pp. 58-59). That seems to us like saying a foreign corporation can bring the material into the state, but must not place it on the Texas soil, or connect it with other machinery where it is to be used, and the question is where could the same be placed without being subject to outlawry.

The seller does not, either as a part of the consideration of sale, or otherwise, contract to install the machinery, or to deliver the machinery installed. Its duty under the terms of the contract was to deliver the machinery at the railway depot at Stockdale. (pp 37-38). If an

engineer is furnished his services are based on a separate and distinct consideration, being a per diem and expenses going to such engineer, and paid by purchaser. (pp. 33-34).

As said by the court in the case of Leschens & Sons Rope Company v. Moser, 159 S. W. 1018, a Texas case and decided by the same court which decided this case:

> Appellants did not undertake the installation of the tramway, but merely agreed to furnish a competent man, if desired, who would superintend its installation, and for whose services Moser was to pay at a certain price. No obligation rested on Moser to accept or retain the services of this man, but it appears that he did accept such services and even delegated to him the power to hire and discharge those wo erected the tramway for Moser and who were paid by Moser for their work. The contract did not provide for the sale and delivery of the tramway after its completion, nor did it call for the sale of a tramway delivered with an agreement to install, but it merely proposed to furnish a competent superintendent in order to facilitate the erection of the machinery by Moser and make proper adjustment thereof. We do not think this incidental agreement can be given the effect of making the transaction one not involving interstate commerce. To so hold would mean that a corporation in another state would have to forego sales in such state of machinery to be erected in this state, if the purchaser refused to buy unless the corporation furnished a capable man to supervise the erection and adjust the machinery, or else it would have to secure a permit to do business in this state.

The Texas court of civil appeals in the opinion in this case does not seem to overrule its former decision above quoted but its language is directly in conflict, although based on a similar state of facts. But in the face of all of this the court seems to think there might be instances where expert services were needed in installing machinry, the seller might provide for such installment, but

says that plaintiff in error failed to plead such a state of facts, therefore is not entitled to such rights. (p. 59). Even if that suggestion as to pleading was right on principle it has no application to this case, for it is alleged by defendants in error, thereby furnishing both allegation and proof, as follows:

"The labor performed upon this plant by the plaintiff was skilled labor, and the erection of ice and refrigerating plants are highly technical and requires persons skilled and informed in the mechanism and construction of ice plants." (par. XI, p. 25, Tr. of Rec.)

In the opinion of the court of civil appeals it is endeavored to force the case within the principles laid down by this court in the case of Browning vs. City of Waycross, 233 U. S. 16, 58 Law E. 828, but the admitted facts are too distinct for argument.

In the Browning case the seller sold lightning rods and in the contract agreed to erect them, thus performing a distinct local business, and with the principles there laid down we are taking no issue. The Browning case is decided on exactly the same principle laid down by the Supreme Court of the State of Texas, in the case of Smythe Company vs. Ft. Worth Glass & Sand Company 142 S. W. 1157, wherein a foreign corporation agreed to construct gas producers in the State of Texas. That was very properly held to be "doing business in Texas."

The instant case is very different. Here the seller for a fixed consideration agreed to sell and deliver the machinery. (Contract pp. 27-40). It does not agree to construct or install, or to do anything else with the machinery other than to furnish purchasers with an engineer to superintend erection of the machinery sold. This is collateral to the real contract, based on an entirely different consideration, no part of which consideration goes

to the seller, but all goes to the engineer as his compensation. The contract does not require the servicees of such engineer but it is deemed to be for the best interests of the purchasers that some one skilled in the work should superintend the erection. The contract provides that all labor, including the engineer, should be paid for by the purchaser. (pp. 33-34).

Commerce, within the meaning of the federal constitution constitutes all of the intercourse between the parties necessarily or ordinarily involved in a commercial transaction with reference to merchantable commodities, and superintending the proper installation of machinery requiring a technical knowledge is not only ordinarily, but, from a practical view, necessarily involved, and as such should be considered as incidental to and really a part of the interstate transaction. It would be too narrow a construction to allow the sale and delivery, but outlaw any attempt to show the purchasers how to install the purchased machinery.

We are not contending against the principles involved in the cases of Browning vs. City of Waycross, decided by this court, or Smythe Company vs. Ft. Worth Glass & Sand Company, decided by the Supreme Court of Texas; but are insisting that a provision in a contract of sale, and the compliance therewith, by which the seller agrees to furnish an engineer to superintend erection of the machinery sold should not be construed to change what would otherwise be an interstate transaction, into an intrastate one.

We also take issue with and vigorously oppose every word, statement or finding in the opinion of the Texas court of civil appeals that the plaintiff in error undertook to furnish a finished plant, or to deliver a completed plant in the State of Texas, there being no provision in the con-

tract that warrants any such assumption, intimation or finding, and no issue of fact by which the court could rightfully and fairly so find. In this respect the opinion does not reflect the admitted and undenied facts.

Our contention is that under the undisputed evidence the plaintiff in error was not doing business in Texas within the meaning of the statutes referred to; and that the transaction and fulfillment thereof was one in interstate and fully protected under the constitution of the United States; that the statutes of the state do not apply to a contract made and performed as the one under consideration, or if said statute in any way conflicts with the right of plaintiff in error to do and perform an interstate transaction, then, in so far as such conflict arises, the statute is void, and must give way to plaintiff's rights under the commerce clause of the United States Constitution.

The record discloses no conflict of fact, the real contention being to determine the right interpretation of the undispted and conceded facts, thus leaving it for the court to say, under such facts, whether the plaintiff in error, by making and performing of the contract sued on, became an outlaw and is unworthy of protection in the state courts in an effort to secure compensation for property delivered.

It is established and conceded that the transportation of any legitimate article of commerce from one state to another is interstate commerce, the power to regulate which is exclusively given to Congress, and any statute of the state which imposes burdens on, or materially interferes with the free transportation thereof, is necessarily held to be void, both by the state and federal courts.

We do not think the question of installation is right-

fully involved in this, for, by the terms of the contract, the defendants in error were to install the machinery entirely at their own expense. True, the plaintiff in error selected the engineer to superintend the erection of the York Company machinery, but it was for the defendants, and they agreed to pay therefor, hence they were doing the erection or installing.

These considerations, and many others that might be mentioned, clearly indicate the severalty nature of the provisions of the contract, as well as to indicate it was not obligatory on the part of the purchasers to have or use the services of the engineer. Suppose the purchasers, after having made the contract, should have refused the services of such engineer, wherein would there have been any breach of contract on the part of the purchasers. While it is true the seller agreed to furnish an engineer an obligation could only arise when a demand for the engineer had been made by the purchaser.

The burden of showing that the seller was acting or contracting in violation of a statute, was on the party so alleging and if there is to be a conviction it should be supported by affirmative evidence that a wrong has been committed.

The Texas court of civil appeals says the engineer was working under directions of F. W. Pilsbry, and there is no testimony to show what authority or instructions he was given by Pilsbry.

The contract fixes the authority of the engineer and it does seem as though such authority should have been accepted by the court rather than to speculate as to what might have been. The rights of parties are likely to suffer if courts, in adjusting differences, ignore contract authority for what might or might not have occurred.

The Texas court of civil appeals contends that the seller

obligated itself to deliver a finished plant, when the contract only calls for a part of the plant, specific machinery. To arrive at such a conclusion one is farced to overlook or ignore all the contract provisions. There is no expression in the contract tending to such a conclusion. On the contrary the machinery sold constituted only a portion of defendants' ice plant, and to assume or hold that the seller was obligated to deliver a completed plant would be to make it deliver machinery not sold, or described in the contract.

The contract itself provides for the only possession ever taken of the plant by the engineer, and that was voluntarily conceded when the contract was signed. That provision is the "York Manufacturing Company to have entire charge of the plant during the erection of the same and when ready for operation it shall be operated in accordance with the directions given," and the carrying out of this provision is the only possession the evidence fairly shows, and these provisions would seem necessary to produce the desired results. (p. 33).

The facts in this case should be governed by the principles laid down in Caldwell v. North Carolina, 187 U. S. 622; Rearick v. Pennsylvania, 203 U. S. 507; Dozier v. Alabama, 318 U. S. 124.

Even though the above be the wrong construction, of the contract, still it seems to be well settled that the sending of an engineer into the state of the purchaser for the purpose of installing, or superintending the installation of the machinery sold, does not change the transaction from interstate to intrastate. And this would be so even where the contract was entire, that is, where the contract was for a lump sum for machinery and superintending, and there ought to be no doubt about it being so with respect to the price of machinery, in a separable contract, such as this.

The fact that goods are shipped into the state, either direct to the buyer or to agents of the seller for delivery, and such agents come into the state to secure delivery, does not change the nature of an interstate transaction.

Rearick v. Pennsylvania, 203 U. S. 507, 27 Sup. Ct. 159.

Caldwell v. North Carolina, 187 U. S. 622, 23 Sup. Ct. 229.

Dozier v. Alabama, 218 U. S. 124, 54 Law Ed. 965.

Butler's Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 1. (Cer. Denied), 29 Sup. Ct. 686.

Loverin & Brown Co. v. Travis, 115 N. W. 829 (Wis.)

Rock Island Plow Co. v. Peterson, 101 N. W. 616 (Minn.)

Although the proposal or preliminary contract may have been negotiated or made in Texas, the provisions relative to approval in York, Pa., and the approval there, makes it a contract of the latter state; Holder v. Aultman, Miller & Co., 169 U. S. 81, 18 Sup. Ct. 269. (Tes. Loucks p. 6).

However, it does not appear to be material whether a contract covering an interstate transaction was executed within or without the state.

In order that justice may finally be done to the parties the plaintiff in error prays that the judgment in this case may be reversed and rendered with costs.

N. C. ABBOTT,
Attorney for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 200.

YORK MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

V. B. COLLEY ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS OF THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

If this court should follow the findings of the Civil Court of Appeals of Texas that the agreements to manufacture in York, Pennsylvania, and install at destination by furnishing an engineer to superintend the installation, were not severable, then the case presents squarely the question of whether or not a corporation engaged in the manufacture

and sale of refrigerating plants in interstate commerce, may, in the course of such commerce, also complete the delivery of the subject-matter of the sale, by setting up the plant as a unit in the premises of the purchaser, without subjecting itself to the requirements of a foreign State to take out a license to do business therein. It is our contention that interstate commerce should be held to continue to apply to an ice-making machine necessarily shipped in its various parts from one State to another, after delivery and up to and including the time when it is put together and made operative in the place of destination, and that the transaction here was just such a case. The delivery of an ice-making machine upon foundations made by the purchaser, and the work of connecting the various parts thereof, is necessary to make the same operative in the place of destination and essential to the accomplishment of an interstate transaction.

The question presented to the court is controlled by the agreements contained in the contract as to setting up the machinery upon arrival at the premises of the buyer. The court of civil appeals found that plaintiff in error retained the possession of the property until it should be installed, and bound itself to deliver a finished plant (Rec., 56). It construed the contract as an agreement on the part of plaintiff in error to install the plant, provided defendant in error furnished labor to assist plaintiff in error's engineer. Upon such a finding and construction of the contract it was held that the work done by plaintiff in error upon the arrival of the machinery at destination, was doing business in the State of Texas within the meaning of the foreign corporation laws of such State, and that the transaction, therefore, did not relate solely to interstate commerce.

Obviously the ice-making machine could not be shipped, except in its various parts, and the agreement that the same were to be connected and installed upon the premises of the purchaser, was the only means of delivery thereof as a unit, and therefore essential to the accomplishment of an interstate transaction.

It was principally upon the authority of Browning *vs.* Waycross, 233 U. S., 16, 22, 23, that the Court of Appeals reached its conclusion in this case. The statute reviewed in that case was one taxing the business of installing lightning rods, and the question of the right of a foreign corporation to contract to manufacture and put up and make operative a complex machine, without being authorized to do business in the State, was neither before nor passed upon by the court. In the Waycross case the court said:

> "Indeed it is apparent in all three cases that there was not the slightest purpose to enlarge the scope of interstate commerce so as to cause it to embrace acts and transactions theretofore confessedly local, but simply to prevent the recognized local limitations from being used to put the conceded interstate commerce power in a straight jacket so as to destroy the possibilities of its being adapted to meet mere changes in the form by which business of an inherently interstate commerce character could be carried on.
>
> "We are of opinion that the court below was right * * * (*b*) because besides, such business * * * involved no question of the delivery of property shipped in interstate commerce, or of the right to complete an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated * * *.
>
> "Of course we are not called upon here to consider how far interstate commerce might be held to continue to apply to an article shipped from one State to another after delivery, and up to and including the time when the article was put together, or made operative in the place of destination in a case where because of some intrinsic and peculiar quality, or inherent complexity of the article, the making of such agreement was essential to the accomplishment of the interstate transaction."

By connecting the parts of the ice-making machine to make the subject-matter of the sale operative, the seller was only completing delivery of an article manufactured in a for-

eign State and shipped in interstate commerce, and was not engaged in the business generally of erecting machinery.

In the later case of *Davis vs. Virginia*, 236 U. S., 697, 698, wherein the State sought to impose a tax upon the sale of portraits and frames, it was contended, that because the frames were sent to the resident agent and by him offered for sale to the purchaser, there was no interference with interstate commerce. The court said:

> "The court below thought that the purchase of the frames was to be regarded as a separate transaction occurring wholly in Virginia. Whether or not this was its technical aspect as an executed contract, it often has been pointed out that commerce among the States is a practical, not a technical conception. The preliminary contract bound the company to furnish a chance to take a frame with the portrait. * * * and although the bargain was not complete until the company's offer were accepted in Virginia, the furnishing of the opportunity was a part of the interstate transaction."

The performance of the agreement in this case was the practical method of making delivery of an ice-making machine or system, as obviously the same could not be delivered as a unit or operated until installed. It follows that the work done by the seller in this case was necessarily and properly a part of an interstate transaction.

The Court of Appeals suggests that the burden rested upon plaintiff in error to show that the complex character of the machinery affected the sale thereof to such an extent that the requirement to obtain a license to do business in the State was a restriction or regulation of its right to sell such machinery. That the ice-making machine in the instant case could not be shipped except in its various parts, and could not be made operative until connected and installed upon foundations at the place of destination, fully appears from the character of the sale and the terms of the contract.

We submit that no evidence could add to the fact that it was reasonably necessary, to ship the machinery in its various

parts, because of the character thereof, and to connect and install the same before complete delivery of the system could be made. Furthermore, with the permission of the court, we again call attention to the fact that the record shows that the plant was of a complex character, and required special skill to install (Rec., 25). To hold that a company, such as plaintiff in error, cannot connect its plant as a unit at destination, without subjecting itself to the foreign corporation laws of a foreign State, is to practically destroy its right to engage in interstate commerce in its business of manufacturing and selling ice-making machines. Under such a holding, the company would be compelled to take out a license to do business in every State where it sold for delivery therein a refrigerating machine, because to complete the sale, the same must be delivered as a unit, which can only be done by connecting the various parts thereof at destination.

That plaintiff in error was otherwise engaged in business in Texas does not affect its right to recover in this case. It was said by the Court of Civil Appeals in this case that—

> "The evidence sustains a finding to the effect that appellant, at the time it made the contract sued upon, was engaged in the transaction of business in Texas within the meaning of article 1314 of Revised Statutes of 1911 * * *. But it appears that if the execution of the particular contract sued upon, and its performance, constituted interstate commerce, then appellant is entitled to sue upon such contract regardless of the violation of the statute in respect to other transactions or by maintaining an office within the State."

And the same construction was given to the Texas statute in T. & P. Co. *vs.* Davis, 54 S. W., 381; 93 Texas, 378, and Security Co. *vs.* Panhandle Nat. Bank, 57 S. W., 22; 93 Texas, 575.

Respectfully submitted,

H. C. ABBOTT,
Attorney for Plaintiff in Error.